PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 319

THE UNITED STATES, PETITIONER

vs.

ACME OPERATING CORPORATION; LIBERTY TRUST COMPANY, INTERVENOR

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petition for certiorari filed August 24, 1932
Certiorari granted October 17, 1932

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ACME OPERATING CORPORATION; LIBERTY TRUST COMPANY, INTERVENOR

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INDEX

	Original	Print
Petition for writ of certiorari	1	1
Record from Court of Claims	15	8
Petition	15	8
General traverse	28	15
History of proceedings	28	15
Amended intervening petition of Liberty Trust Co	29	16
Exhibit—Contract	44	24
General traverse to amended intervening petition	51	29
Submission of case on merits	51	29
Special findings of fact	52	29
Conclusion of law	72	51
Opinion, Green, J	72	51
Judgment	86	66
Proceedings after entry of judgment	86	67
Clerk's certificate (omitted in printing)	87	67
Order allowing certiorari		69

1 In the Supreme Court of the United States

October term, 1932

No. 319

THE UNITED STATES, PETITIONER

v.

ACME OPERATING CORPORATION, LIBERTY TRUST COMPANY, intervenor

Petition for a writ of certiorari to the Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case rendered February 8, 1932 (not yet reported).

JURISDICTION

The judgment of the court was rendered on February 8, 1932. Motions for new trial were overruled on June 15, 1932. The jurisdiction of this court is invoked under section 3 (b) of the act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction of a claim by a mortgagee not entitled to possession for alleged injuries by the United States to ships which it had requisitioned from the mortgagors.

2. Whether a mortgagee may recover against a third party for alleged injuries to the mortgaged property which are not shown to have been wrongfully inflicted.

3. Whether a mortgagee may recover for alleged injuries to the mortgaged property which do not impair its security.

2 4. Whether the Court of Claims has jurisdiction of a claim for alleged injuries to property when there are no allegations of fact in the petition upon which to base such a claim.

STATUTE INVOLVED

Section 145 of the Judicial Code (U. S. C., title 28, sec. 250) provides in part as follows:

"The Court of Claims shall have jurisdiction to hear and determine the following matters:

"First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for dam-

ages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. * * *"

STATEMENT

This was a suit by the Acme Operating Corporation for just compensation alleged to be due it as charterer of two vessels, the use of which was requisitioned by the Government. The Liberty Trust Company intervened, asserting a right to a substantial part of any recovery by the Acme Operating Corporation, as well as setting up claims of its own. The facts are very complicated and the findings of the court occupy 20 pages. The facts relevant to the issues here presented may be summarized as follows:

3 The two ships in question, the S. S. "J. S. Whitney" and the S. S. "H. M. Whitney," were owned, respectively, by the Acme Steamship Corporation and the Whitney Steamship Corporation, of New York. The S. S. "J. S. Whitney" was subject to a mortgage of $150,000 held by the Fidelity Trust Company of Boston, Massachusetts (predecessor in interest of the intervenor), and the S. S. "H. M. Whitney" was subject to a mortgage of $200,000 held by the same company. (Findings 2, 6, 13, 22.) The Acme Operating Corporation (the plaintiff), a corporation organized under the laws of New York, chartered the ships from the owners on January 7, 1918. (Findings 12, 13.) About the same time the two vessels were placed in the yards of construction companies for enlargement and repair. Work was completed on April 10, 1918, in the case of the S. S. "H. M. Whitney," and shortly after April 27, 1918, in the case of the S. S. "J. S. Whitney." Part of the cost of this work was paid, leaving a balance of $132,509.45 due on the S. S. "J. S. Whitney" and of $253,640.63 on the S. S. "H. M. Whitney." (Findings 8, 9.)

Pursuant to authorization conferred by the act of June 15, 1917 (40 Stat. 182), and Executive order, the Government requisitioned the two ships on April 27, 1918. (Findings 1, 16, 18, 19.) At about the same time both ships were arrested by United States marshals under libels filed by the construction companies to recover the balances due them, and were subsequently released to the Government by orders of court. (Findings 18, 19.)

4 On August 12, 1918, the Government and the owners of the ships (Acme and Whitney Steamship Corporations) executed a contract with respect to the ships, to which the Fidelity Trust Company was a party. This contract is annexed to the intervening petition and is made a part of finding 22 by reference. It provided that expenditures by the Government in behalf of the owners, for shipment of the cargoes which were in the ships at the time of requisition, should be repaid to the Government out of the sums due the owners as just compensation for the use of the ships.

If the just compensation exceeded the debt to the Government, the excess was to be applied to the payment of the mortgages and liens on the ships; but if the just compensation was less than the sum due the Government, it was to have a lien on the ships, to the extent of the difference, superior to the mortgage liens of the Fidelity Trust Company.

In December, 1918, requisition charter parties between the Government and the owners of the ships were executed on the standard form as of the dates of the requisitions. The charter parties provided that the owners accepted them in full satisfaction of any claims they might have against the Government arising from the requisitions. (Finding 22.) The S. S. "H. M. Whitney" remained in the Government service until December 26, 1918, and the S. S. "J. S. Whitney" until May 22, 1919, on which respective dates the ships were placed in New York Harbor, where they remained until returned to their owners. (Finding 21.)

On June 30, 1919, the owners of the ships agreed to deliver
5 them to a representative of the Fidelity Trust Company to be operated for the latter's benefit. They then notified the Government of their readiness to accept the return of the ships. As they were in need of repairs, it was agreed between the Government and the owners that the vessels should be surveyed for the purpose of ascertaining the cost of placing them in satisfactory condition. The vessels were delivered to the owners early in July, 1919. (Finding 28.) At that time the value of the ships in good repair was $482,000 for the S. S. "J. S. Whitney" and $436,000 for the S. S. "H. M. Whitney." (Finding 32.) The survey took place in the last week of July, 1919, and the cost of reconditioning the vessels was fixed at $87,706.84, which sum the Government credited to the owners of the ships. (Finding 28.)

In order to prevent the proceedings which had been begun by the construction lienors in 1918 from proceeding to sale of the vessels, the Fidelity Trust Company entered into agreements for the purchase of their claims on August 5, 1919, pursuant to which it later received an assignment of all of one claim and of the greater part of the other. (Finding 29.)

The ships had been placed in dry dock for repairs and reconditioning by their owners shortly after the Government returned them in July, 1919. After the completion of this work on August 29 and September 30, 1919, respectively, they were removed by the Fidelity Trust Company's representative. The Trust Company paid $55,377.26 "for sundry services and materials" in connection with the S. S. "J. S. Whitney" and $81,087.50 "for sundry services and materials" in connection with the S. S. "H. M. Whitney." These
6 sums were charged to the owners of the ships. Most of this money was spent "for direct repairs," but $7,165 of it was not spent for repairs or reconditioning worn portions of the ships. (Finding 24.)

In September, 1920, the Fidelity Trust Company became financially embarrassed and was taken over by the Massachusetts commissioner of banks; and in April, 1921, its assets were transferred to the present intervenor. (Finding 29.)

A final accounting between the owners of the ships and the Government (not completed until 1926), which included the credit to the owners of the sum of $87,706.84 which had been fixed by the board of survey as the cost of reconditioning the ships, showed a balance still owing to the Government of $77,068.54. This accounting was correct. (Finding 33.)

The claim of the plaintiff was based upon its right as charterer of the vessels from their owners. This contention was disposed of by the court on the grounds, among others, that at the time the ships were requisitioned the plaintiff neither had nor was entitled to their possession, and that the plaintiff and the owners of the ships, all of which were controlled by the same persons, were alter egos, so that payment of just compensation to the owners was payment to the plaintiff. With this branch of the case we are no longer concerned.

7 The intervenor sought recovery as assignee of the mortgages and construction liens. It alleged that its predecessor had been prevented from foreclosing the mortgages as a result of the requisition, and that since the ships had no market value at the time they were released from requisition, the security for the mortgages had been rendered worthless. Its petition concluded with a prayer for "such further and other relief" as it might be entitled to. The court gave judgment in favor of the intervenor for $129,299.76, with interest at 6 per cent from October 1, 1919, to February 8, 1932.

The opinion of the court with respect to the claim of the intervenor is difficult to follow. The court states that the case necessitates "the determination of a new principle for which [it found] no direct precedents in the authorities." It says that since the intervenor's predecessor was not entitled to possession of the ships at any time between the dates of requisition and release from Government service it could not recover compensation for the taking and therefore had no claim for the depreciation in market value. The court proceeded, however, to give judgment to the intervenor for the sum of $129,299.76, which it had found was expended by the intervenor's predecessor "for direct repairs" in reconditioning the vessels after their release from requisition. (See Finding 24.) It said that the Government was liable to someone for damage done the vessels, and that the Government's credit to the ship owners of the cost of reconditioning the ships did not protect it as against the intervenor's

8 predecessor. The court analogized the case to that of a mortgagee not in or entitled to possession, who may recover against a third person for injuries to his interest in the mortgaged property. Although recognizing that this rule applies only where the third person acts wrongfully, and that the action of the Government in taking possession of the ships in this case was not wrongful, the court said that the same principle applied. It hurdled the diffi-

culty that such a claim had not been pleaded by saying that the matter had been argued by the parties without objection and that the broad prayer for relief was sufficient to include this claim, and concluded by allowing recovery of repairs necessary to restore the vessels to their condition when requisitioned by the Government, although a substantial portion of the "repair" was not found to be necessary for this purpose and was merely assumed to be so in the opinion.

ASSIGNMENTS OF ERROR

1. The court erred in taking jurisdiction of a claim for damages sounding in tort.
2. The court erred in permitting the intervenor to recover without a showing that the alleged injuries to the mortgaged property were wrongfully inflicted.
3. The court erred in permitting the intervenor to recover despite the fact that the alleged injuries had not impaired the mortgage security.
9 4. The findings of the court do not support the judgment, since they do not disclose the character, purpose, or necessity of the expenditures for which recovery was had, or that these expenditures were made necessary by any act of the Government.
5. The court erred in taking jurisdiction of a claim which was not pleaded.
6. The court erred in giving judgment for the intervenor.

10 REASONS FOR GRANTING THE WRIT

The decision of the court below seems erroneous; and in its determination of the "new principle for which [it found] no direct precedents in the authorities" the court so far departed from the usual and accepted course of judicial procedure as to require the exercise by this court of its supervisory powers of review. The effect of the determination of the "new principle" was to eliminate the following basic essentials of the intervenor's cause of action:

(1) Section 145 of the Judicial Code, supra, which defines the jurisdiction of the Court of Claims, expressly excludes cases sounding in tort; and it is now settled that the jurisdiction of that court depends upon contract, express or implied in fact. (Alabama v. United States, 282 U. S. 502; Pearson v. United States, 267 U. S. 423, 427; Klebe v. United States, 263 U. S. 188; Keokuk & Hamilton Bridge Co. v. United States, 260 U. S. 125; Basso v. United States, 239 U. S. 602.) In the present case the court has found neither an express contract nor an implied contract upon which to base the intervenor's claim for damages. On the contrary, the court expressly holds that since the intervenor's predecessor was not entitled to possession of the ships at any time between the dates they were requisitioned and released, the Government took nothing from it (Opinion, pp. 31–32.) From this it seems clear that there was no

privity between the intervenor's predecessor and the Government. (Cf. Robins Dry Dock Co. v. Flint, 275 U. S. 303.) It is noteworthy that the cases to which the court analogized this one were tort cases, and the court speaks of the claim as one for "an injury," which implies tortious conduct. Indeed, the claim of a
11 mortgagee not entitled to possession for injury to the mortgaged property must necessarily be based on tort. (See cases cited infra under (2).)

(2) The decision of the court below is in conflict with the great weight of authority, which is to the effect that a mortgagee not in or entitled to possession may not maintain an action against a third person for a taking of or injury to the mortgaged property unless the taking or other injury was wrongful. This was the situation in both cases cited by the court. (George Adams, etc., Co. v. National Bank, 123 Fed. 641 (C. C. A. 8th); O'Brien v. Miller, 117 Fed. 1000 (C. C. D. Conn.). See also Morgan v. Gilbert, 2 Fed. 835 (C. C. W. D. Mich.); Clapp v. Spokane, 53 Fed. 515, 517 (C. C. D. Wash.); Jones on Mortgages (8th ed.), §§ 851, 859, and cases cited.) There is no finding in the present case that the repairs for which the intervenor's predecessor paid were necessitated by wrongful treatment of the ships. The court holds expressly that the action of the Government in taking possession of the ships was lawful. Certainly use of the ships which would subject them to ordinary wear and tear would be one of the incidents of such rightful possession. The opinion and finding 24 disclose that recovery has been had for "repairs" not shown to have been made necessary unless by ordinary wear and tear, which may perhaps be assumed. It is common knowledge that such repair or reconditioning is necessitated by ordinary use of ships. While the Government's obligation to pay just compensation to the owners of the ships
12 for their use, or the charter parties between the owners and the Government, may have imposed the duty of replacing the ships in good condition upon their return, the court has found that all the Government's obligations to the owners were satisfied. (Finding 33.) The accounting between the Government and the owners included a credit to them of the $87,700 fixed by the Board of Survey as the cost of reconditioning the ships. (Findings 28, 33.) In the absence of contract, there would seem to be no duty by the Government to pay the cost of repairs necessitated by ordinary use to a mortgagee which was neither in nor entitled to possession of the ships when they were requisitioned. But the only contract between the Government and the intervenor's predecessor was that of August 12, 1918, by which it was agreed that all sums found to be due from the Government for use of the ships should be credited against the debts of the owners to the Government before any payment to mortgagees or other lienors. (Finding 22.)

(3) The decision of the court below is in conflict with the weight of authority, which is to the effect that a mortgagee not in or en-

titled to possession may recover for injuries to the mortgaged property only when such injuries impair its security. This limitation is expressed by the cases cited by the court. (George Adams, etc., Co. v. National Bank, supra, 123 Fed. 641, 645; O'Brien v. Miller, supra, 117 Fed. 1000. See also McGahan v. Bank, 156 U. S. 218, 235; Union Trust Co. v. Woodrow Mfg. Co., 48 F. (2d) 194, 197 (C. C. A. 8th); Morgan v. Gilbert, supra, 2 Fed. 835; Clapp
13 v. Spokane, supra, 53 Fed. 515, 517; Jones on Mortgages, supra, §§ 846, 857, 858, 859, and cases cited.) When the Government returned the ships to their owners in July, 1919, they were together worth $918,000 in good condition. (Finding 32.) The liens then outstanding totaled about $750,000. (Finding 29.) Hence, even if we deduct from the value of the ships the $129,000 spent by the intervenor's predecessor in reconditioning them, they were still worth more than enough to cover all the outstainding liens. While a mortgagee apparently may recover for injuries to the mortgaged property under the law of Massachusetts without showing impairment of security, the basis for the rule is that in Massachusetts the mortgagee has title and a present right to possession. (See Morgan v. Gilbert, supra, 2 Fed. 835, 837–838; Sutherland on Damages (4th ed.), pp. 3837–3838.) The court below expressly held the Massachusetts rule inapplicable here, on the ground that the intervenor's predecessor was not entitled to possession of the ships at any time between the dates of requisition and release.

It should also be noted that the decision is open to question on two other grounds. The intervenor did not allege any facts upon which to base a claim for injury to the ships, and the decision on that ground came as a complete surprise to Government counsel. A motion for new trial was filed raising this point among others,
14 but it was overruled by the court without opinion. Moreover, the findings, which should be read in connection with the comments in the opinion upon the nature of the expenditures for which recovery has been had, are not sufficient to support the judgment, even upon the erroneous theory adopted in the court below, since, with respect to a substantial portion of these expenditures, it is not found that they were for repairs which were necessary to restore the vessels to their condition when requisitioned by the Government. (See Finding 24.)

CONCLUSION

The petition should be granted.
Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

AUGUST, 1932.

[Title and index omitted.]

15 In the Court of Claims of the United States

No. E-260

ACME OPERATING CORPORATION, PETITIONER

against

UNITED STATES OF AMERICA, RESPONDENT

I. *Petition*

Filed April 9, 1925

To the Honorable the Chief Justice and the Associate Justices of the United States Court of Claims:

Your petitioner, Acme Operating Corporation, respectfully represents:

I

Said Acme Operating Corporation is a corporation duly organized and existing under the laws of the State of New York.

16 II

Heretofore, to wit, in October and November, 1917, respectively, the American cargo steamships "James S. Whitney" and "Henry M. Whitney," neither of which was then able to carry as much as twenty-five hundred (2,500) tons total dead weight, including bunkers, water, and stores, were purchased from the Eastern Steamship Company by Robert E. Miller and Bartholomew L. Stafford as co-partners.

III

On or about the 3rd day of January, 1918, the said steamship "Henry M. Whitney" was duly transferred to the Whitney Steamship Corporation, a corporation duly organized and existing under the laws of the State of New York, and said corporation was the owner of said steamship at all subsequent times hereinafter mentioned.

IV

On or about the 5th day of January, 1918, the steamship "James S. Whitney" was duly transferred to the Acme Steamship Corporation, a corporation duly organized and existing under the laws of the State of New York, and said corporation was the owner of said steamship at all subsequent times hereinafter mentioned.

V

On or about the 5th day of January, 1918, said steamships "James S. Whitney" and "Henry M. Whitney" were duly chartered by the aforesaid respective steamship corporations to the aforesaid Robert E. Miller and Bartholomew L. Stafford under charter parties and agreements providing for the reconditioning of said two
17 steamships at very heavy expense and providing for the advance by the charterers of various sums required to pay the expenses of such reconditioning. Thereafter, and on or about the said 5th day of January, 1918, the said Robert E. Miller and said Bartholomew L. Stafford did transfer and assign to the aforesaid Acme Operating Corporation the said charter parties of the said two steamships and said agreements and all their right, title, and interest thereunder.

VI

Said Acme Operating Corporation, acting under the aforesaid charter parties and agreements and other agreements of similar effect, immediately took possession of and managed and operated said two steamships, booked freights and made payments of very large sums of money on repair bills and other obligations of said two steamships, and extensive repairs and alterations were made by said Acme Operating Corporation to said two steamships as a result of which their dead-weight tonnage was greatly increased and they were duly classified by the American Bureau of Shipping as seaworthy and of the highest class for ocean-going service, and the American Bureau of Shipping issued its certificates and ocean insurance was granted accordingly.

VII

Pursuant to the aforesaid charter parties and agreements, and other agreements of similar effect, said Acme Operating Corporation, and its predecessors, paid out on account of, and advanced to, the owners of said two steamships very large sums of money sufficient to pay the charter hire thereof for a long period
18 of time, to wit, about two years from the time said Acme Operating Corporation took possession of said two steamships as aforesaid; and it was understood and agreed between said Acme Operating Corporation and the aforesaid owners of said two steamships that said Acme Operating Corporation was to have the possession, use, and control of said two steamships until the charter hire thereof should be sufficient to repay to said corporation the amount so advanced.

VIII

The aforesaid time charter parties to the said Acme Operating Corporation was verbally extended as aforesaid, such extensions

being confirmed by written memoranda and by prepayment of the charter hire by said Acme Operating Corporation in accordance with the terms of said charter parties, and said Acme Operating Corporation duly performed all of the terms and conditions of the said charter parties of the said two steamships and the aforesaid agreements on its part to be performed.

XI

Public Act No. 23, of the 65th Congress, House Resolution 3971, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15th, 1917, provides that:

"The President is hereby authorized and empowered, within the limits of the amounts herein authorized: (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship."

19

The act further provides:

"Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

The act also provides:

"The word 'person' shall include any individual, trustee, firm, association, company, corporation or contractor."

"The word 'ship' shall include any boat, vessel or submarine and the parts thereof."

X

That in pursuance of provisions of said act of June 15th, 1917, the President of the United States, on July 11th, 1917, issued an Executive order, as follows:

"By virtue of authority vested in me in the section entitled 'Emergency shipping fund' of an act of Congress entitled 'An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on

20

account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved June 15th, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels, and the completion thereof, and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

"And I do further direct that the United States Shipping Board shall have and exercise all power and authority vested in me in said section of said act insofar as applicable to and in furtherance of the taking over of title or possession, by purchase or requisition of constructed vessels or parts thereof, or charters therein, and the operation, management, and disposition of such vessels, and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said board, be exercised directly by the said board or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

"WOODROW WILSON.

"THE WHITE HOUSE, 11 July, 1917."

21 XI

That the United States Shipping Board on October 12th, 1917, by virtue of the provisions of the act of Congress of June 15th, 1917, and the Executive order of the President, dated July 11th, 1917, above recited, issued a requisition order as follows:

"The United States Shipping Board hereby gives notice to all owners of ships registered and enrolled under the laws of the United States that the requisition of all American steamers described below and of which previous announcement has been made, will become operative and effective on October 15th, 1917, at noon.

"1. The ships affected by said requisition and included therein are: (a) All cargo ships and tankers able to carry not less than 2,500 tons total dead weight, including bunkers, water, and stores; (b) all passenger steamers of not less than 2,500 tons gross register.

"2. (a) As to all steamers in or bound to American ports on October 15th, 1917, requisition becomes effective after discharge of inward cargo and ship is put in ordinary good condition.

"(b) As to steamers which have started to load their outward cargo, requisition becomes effective at noon on October 15th, 1917, and accounts as to hire and expenses will be adjusted from time steamer began to load.

"3. Steamers trading to and from American ports that have sailed on their voyage prior to October 15th, 1917, at noon, are to complete that voyage as promptly as possible and report for requisitioning.

"4. Steamers that are occupied in trades between foreign ports shall be requisitioned as of October 15th, 1917, at noon, and accounts adjusted accordingly.

22 "5. (a) Owners, whose steamers are operating in their regular trades, are to continue the operation of their steamers for account of the Government, as they have been doing for themselves, until they receive further instructions.

"(b) Owners, whose steamers are chartered to others, will apply to the Shipping Board for instructions regarding the future employment of said steamers."

XII

Shortly after the aforesaid repairs and alterations were made, as a result of which the tonnage of said two steamships was increased and they were duly classified as aforesaid, the United States, through the United States Shipping Board, pursuant to the aforesaid act of Congress and the aforesaid Executive order, did requisition the said steamship "James S. Whitney" on or about the 27th day of April, 1918, and did requisition the said steamship "Henry M. Whitney" on or about the 29th day of April, 1918, together with their respective engines, boilers, tackle, apparel, equipment, furniture, and all supplies on board, and did on said dates take physical possession thereof and put them in service other than that of the aforesaid owners and charterer.

At the time of the aforesaid requisition, the said steamship "Henry M. Whitney" was lying at New York fully loaded and ready to sail for Italy, and the said steamship "James S. Whitney" was lying at Charleston completing loading and repairs and about to sail en route from New York to Genoa, export licenses and war insurance having been granted on all cargo for both vessels.

XIII

At the time of the aforesaid requisition, the said steamship "James S. Whitney" was able to carry approximately 3,750 tons total
23 dead weight and her speed was 16½ knots, and she was of peculiar value for war-time service on account of her type, size, and speed, and there were no other steamships of similar type, size, and speed that could be obtained during the entire requisition period by her said owners and charterer to replace her, and had her said owners and charterer been permitted to continue to operate her, she would have earned in excess of four hundred and fifty thousand ($450,000) dollars per month net during all times from the date of requisition until her surrender hereinafter mentioned.

XIV

The average fair bare-boat charter hire in the open market for vessels of the nearest type, size, and speed to said steamship "James S. Whitney" was $9.00 per deadweight ton per month at the time when the said steamship was requisitioned and taken possession of by the said Shipping Board as aforesaid, and thereafter until said steamship was released from such requisition.

XV

At the time of the aforesaid requisition the said steamship "Henry M. Whitney" was able to carry approximately 3,800 tons total dead weight and her speed was 14½ knots, and she was of peculiar value for war-time service on account of her type, size, and speed, and there were no other steamships of similar type, size, and speed that could be obtained during the entire requisition period by her owners and charterer to replace her, and had her owners and charterer been permitted to continue to operate her, she would have earned in excess of four hundred and fifty thousand ($450,000) dollars per month net during all times from the date of requisition until her surrender hereinafter mentioned.

24

XVI

The average fair bare-boat charter hire in the open market for vessels of the nearest type, size, and speed to said steamship "Henry M. Whitney" was $9.00 per dead-weight ton per month at the time when the said steamship was requisitioned and taken possession of by the said Shipping Board, as aforesaid, and thereafter until said steamship was released from such requisition.

XVII

At the time that the said two steamships were requisitioned and taken possession of by the Shipping Board, as aforesaid, they had on board stores, fuel, and supplies of the fair and reasonable aggregate value of eight-two hundred eighty-seven and 25/100 ($8,287.25) dollars, the property of the said Acme Operating Corporation, which stores were taken over and appropriated by the said Shipping Board under said requisition.

XVIII

The said steamships "James S. Whitney" and "Henry M. Whitney" were retained by the Shipping Board continuously and used by it in service other than that of the said owners and charterer up to and until said steamship "James S. Whitney" was surrendered on or about July 10th, 1919, and until the said steamship "Henry M. Whitney" was surrendered on or about July 8th, 1919.

XIX

Neither the United States nor the United States Shipping Board, nor their agents or representatives, have made any payment or compensation whatsoever to your petitioner for the use of either of the aforesaid two steamships or for the aforesaid stores, fuel, and supplies taken or freights collected or monies paid.

XX

On or about the 23rd day of April, 1919, in good faith and without knowledge of the fact that such assignment was void under the statutes of the United States, your petitioner did assign all its right, title, and interest in this claim to the Acme Steamship Corporation and Whitney Steamship Corporation, respectively; but your petitioner is bringing this suit upon the assumption that such assignment so made is absolutely void as against the United States Government and that under the decisions of the Supreme Court of the United States, it is, notwithstanding such assignment, entitled to maintain this action.

XXI

By reason of the foregoing, there became due from the Government of the United States to the petitioner the following sums:

Fuel and supplies taken	$8,287.25
Charter hire S/S James S. Whitney, speed 16½ knots (3,750 DWT., at $9 per month, $33,750), 6.30 p. m., April 27th, 1918, to April 23rd, 1919, 11 months, 27 days	401,575.00
Charter hire S/S Henry M. Whitney, speed 14½ knots (3,800 DWT., at $9 per month, $34,200), 1 p. m., April 29th, 1918, to April 23rd, 1919, 11 months, 25 days	404,700.00
	814,562.25

XXII

Your petitioner has made claim against the United States, through the United States Shipping Board, for the just compensation herein claimed; and the United States Shipping Board has disallowed and refused to pay your petitioner's said claim; no action thereon has been taken by Congress or any department except as hereinbefore stated; no person, other than your petitioner, is the owner of the said claim, or of any part thereof; no assignment or transfer of said claim, or of any part thereof or of any interest therein, has been made by your petitioner except as above stated; your petitioner is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant and said Robert E. Miller and Bartholomew L. Stafford are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

XXIII

Your petitioner has not pending in any other court any suit or process against any person whatever for or in respect to the said claim against the United States, or any part thereof.

XXIV

This action is brought pursuant to the act of June 15th, 1917 (chapter 29, section 11), and acts amendatory thereof, and pursuant to the Revised Statutes (section 1072) and the Judicial Code of the United States, being act of March 3rd, 1887 (chapter 359), and act of March 3rd, 1911 (chapter 231), and acts amendatory thereof.

27

XXV

Your petitioner therefore prays judgment and decree of this honorable court against defendant, United States, for the sum of eight hundred and fourteen thousand five hundred sixty-two and 25/100 ($814,562.25) dollars or such other amount as will be just compensation to your petitioner for the taking of said vessels, monies, fuel, stores, and supplies by defendant, United States, as aforesaid.

ACME OPERATING CORPORATION,
By BARTHOLOMEW L. STAFFORD,
President.

[*Duly sworn to by Bartholomew L. Stafford; jurat omitted in printing.*]

28

II. *General traverse*

Filed June 8, 1925

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

A. C.

III. *History of proceedings*

On December 17, 1925, Messrs. Howe & Bradley filed a motion to intervene by Liberty Trust Company.

On January 8, 1927, the plaintiff filed an answer to the motion to intervene.

On February 4, 1927, the court allowed the motion to intervene subject to objection by any party in interest.

On February 4, 1927, the Liberty Trust Company filed its petition as intervenor.

On June 28, 1928, on motion made therefor, the intervenor filed an amended petition.

Said amended intervening petition is as follows:

29 IV. *Amended intervening petition of Liberty Trust Company*

Filed June 28th, 1928

To the Honorable Chief Justice and Associate Judges of the United States Court of Claims:

The petitioner, Liberty Trust Company, respectfully represents:

I

The petitioner, Liberty Trust Company, is a banking corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, having a usual place of business in Boston.

II

In October and November, 1917, Robert E. Miller and Bar-
30 tholomew L. Stafford, hereinafter referred to as Miller and Stafford, purchased from the Eastern Steamship Company the American cargo steamships "James S. Whitney" and "Henry M. Whitney." Miller and Stafford were represented in these transactions by one Allan S. Farwell, of Ashland, Massachusetts, to whom the title to above-mentioned vessels was transferred.

III

Fidelity Trust Company, a banking corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, having a usual place of business in Boston, loaned to said Farwell the sum of one hundred fifty thousand dollars ($150,000.00) upon Farwell's promissory note dated October 30, 1917, secured by mortgage, on the steamship "James S. Whitney," dated October 30, 1917, and recorded in the office of the collector of customs at Boston in book 348, page 157, and in the office of the collector of customs at New York in book 17–M, page 269.

IV

Said Fidelity Trust Company loaned to Farwell a further sum of two hundred thousand dollars ($200,000.00) upon Farwell's promissory note dated December 4, 1917, secured by mortgage, on the steamship "Henry M. Whitney," dated December 4, 1917, and re-

corded in the office of the collector of customs at Boston in book 348, page 162, and in the office of the collector of customs at New York in book 17–M, page 280.

V

The "James S. Whitney" and the "Henry M. Whitney"
31 were on October 30, 1917, and on December 4, 1917, respectively, conveyed by the said Farwell to Robert E. Miller and Bartholomew L. Stafford as co-partners, the record title being taken in each case in the name of Bartholomew L. Stafford on behalf of himself and his co-partner. Simultaneously with each conveyance, the title to each of the ships was then conveyed to Arthur A. Miller as the nominee of the Equitable Trust Company, of New York. All of the conveyances were made subject to the respective mortgages referred to in Articles III and IV hereof.

VI

Miller and Stafford caused to be organized under the laws of the State of New York three corporations, to wit, the Whitney Steamship Corporation, the Acme Steamship Corporation, and the Acme Operating Corporation. Subsequently the Whitney Steamship Corporation acquired title to the "Henry M. Whitney," and the Acme Steamship Corporation acquired title to the "James S. Whitney." Your petitioner is informed and believes and therefore alleges that the stock ownership and control of the three corporations named in the next preceding paragraph of this article was in Miller and Stafford from the dates of their respective organization in December, 1917, until April 23, 1919, when Robert E. Miller assigned all his stock in Acme Operating Corporation to Claude T. Stafford as the nominee of Bartholomew L. Stafford.

VII

The United States, by and through the United States Shipping
Board, on or about April 27, 1918 (acting under authority of
32 the act of June 15, 1917 (c. 29, 40 Stat. 182), and the President's Executive order of July 11, 1917), requisitioned the steamship "James S. Whitney" in Charleston, South Carolina.

At about the time the "James S. Whitney" was requisitioned, as aforesaid, a libel in rem for the sum of one hundred thirty-two thousand five hundred nine and 45/100 dollars ($132,509.45) was filed in the District Court of the United States for the Eastern District of South Carolina against the ship by the Valk & Murdock Company, of Charleston, South Carolina, for repairs done, labor performed, and materials furnished.

The Shipping Board, by its counsel, appeared specially and made application that the vessel be released from the jurisdiction of the court and delivered over to the United States upon the ground that

at the time of the issuance of the warrant of attachment in the libel proceeding the vessel had been requisitioned by the United States. An interlocutory order was issued May 18, 1918, in which the court, after reciting the provisions of the act of June 15, 1917, supra, relative to the payment of compensation by the United States for vessels requisitioned, ordered and decreed that in order to protect the rights of parties having prior liens upon the vessel and who had come into court to have them adjudicated, the amount to be paid (by the United States) for the use of the vessel should be treated as and in lieu of the vessel itself, and that the libellants were entitled in priority to the owners to any sum or sums to be paid on account of the requisition of the vessel. On May 27, 1918, the cause came on further to be heard and an order was entered directing that the "James S. Whitney" be delivered to the United States Shipping Board.

33 VIII

The United States Shipping Board, on or about April 29, 1918 (acting under the authority of the act of June 15th, 1917, and the President's Executive order, supra), requisitioned the steamship "Henry M. Whitney" in New York.

At about the time the "Henry M. Whitney" was requisitioned, as aforesaid, a libel in rem for the sum of two hundred sixty thousand one hundred forty-nine and 87/100 dollars ($260,149.87) was filed in the District Court of the United States for the Eastern District of New York against the ship by Theodore A. Crane's Sons Company for repairs done, labor performed, and materials furnished.

The Shipping Board, by its counsel, appeared before the court and stated that the vessel was needed by the Government for war purposes and requested that it be released from the jurisdiction of the court. On May 29, 1918, the court entered the following order: That the United States marshal (who had the custody of the vessel by virtue of certain writs of attachment in the libel proceeding) appoint the master of the ship a special deputy United States marshal; that said deputy remain in possession of the vessel in behalf of the marshal; that the vessel, in his custody, be turned over to the Shipping Board for purposes connected with the war; that the special deputy marshal or his substitutes remain always in possession; and that the vessel be returned to the custody of the marshall upon being released from requisition by the Shipping Board.

34 IX

At the time the "James S. Whitney" and the "Henry M. Whitney" were requisitioned, as aforesaid, certain cargoes (on which the freight had been prepaid by the owners thereof) had been

shipped aboard the vessels consigned to Genoa, Italy. On August 12, 1918, a written contract (a copy of which is annexed hereto) was entered into between the United States Shipping Board (on behalf of the United States of America), Whitney Steamship Corporation and Acme Steamship Corporation (as the owners of the vessels), certain owners of the cargoes shipped, as aforesaid, and Fidelity Trust Company (as the holder of mortgages on the vessels); under the terms of the contract the United States agreed to pay just compensation for the requisition of the vessels and to forward the cargoes to their destinations; the owners of the vessels, namely, the Whitney Steamship Corporation and the Acme Steamship Corporation, agreed to pay to the United States the sum of one hundred eighty-seven thousand dollars ($187,000.00) as part payment for the forwarding the cargoes, as aforesaid; from the amount to become due on account of the requisition of the vessels it was further agreed that the United States should retain a sufficient amount to pay the balance due it for forwarding the cargoes; and that the claim of the United States for forwarding the said cargoes should be prior to the mortgages of Fidelity Trust Company and the liens of the cargo owners; and—

"In the event of the party of the first part (United States) fully reimbursing itself out of the compensation due for the requisitioning of said steamers, or either of them, for the aforesaid
35 compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, the party of the first part (United States) shall have the right to apply any further compensation which shall become due for the requisitioning of said steamers to the payment of any mortgages, and/or just claims constituting liens on said steamers, or either of them."

X

The "James S. Whitney" was released from requisition in July, 1919. Fidelity Trust Company, at the request of the Whitney Steamship Corporation and the Acme Steamship Corporation, and in order to permit the private operation of the ship and to protect its interest as mortgagee, on September 20, 1919, purchased the above-mentioned lien of the Valk & Murdock Company on the "James S. Whitney" for one hundred forty-five thousand two hundred sixty-three and 48/100 dollars ($145,263.48).

XI

The "Henry M. Whitney" was released from requisition in July, 1919. The Theodore A. Crane's Sons Company, on August 16, 1918, obtained a judgment in the aforesaid libel proceedings for the sum of two hundred sixty thousand one hundred forty-nine and 87/100

dollars ($260,149.87), plus interest of fifteen thousand one hundred seventy-five and 40/100 dollars ($15,175.40), making a total amount of two hundred seventy-five thousand three hundred twenty-five and 27/100 dollars ($275,325.27). Fidelity Trust Company, at the request of the Whitney Steamship Corporation and the Acme
36 Steamship Corporation, and to prevent the ship from being seized and sold to satisfy the aforesaid judgment, entered into a contract with the judgment creditor whereby Fidelity Trust Company was to pay the sum of seventy-five thousand dollars ($75,000.00) to the Theodore A. Crane's Sons Company and received an assignment of its judgment to the extent of the payment made and that Fidelity Trust Company would have the privilege of making such further payments as it wished at the same time receiving an assignment of the said judgment to the extent of the payments made. Fidelity Trust Company paid, on account of the judgment of the Theodore A. Crane's Sons Company, the sum of two hundred six thousand five hundred twenty-six and 10/100 dollars ($206,526.10) and received assignments of the judgment in that amount.

XII

In return for the payments on the judgment held by Theodore A. Crane's Sons Company and the lien of Valk & Murdock Company by Fidelity Trust Company, the mortgage note on the "James S. Whitney" of one hundred fifty thousand dollars ($150,000.00), given by Farwell as aforesaid, was endorsed by the Acme Steamship Corporation and the Whitney Steamship Corporation; and to protect further the Fidelity Trust Company, on account of the sums advanced on the aforesaid mortgages and in the payment of the aforesaid liens, the Acme Steamship Corporation gave to Fidelity Trust Company a further bond and mortgage of two hundred thousand dollars ($200,000.00) on the steamship "James S. Whitney."

37

XIII

In return for the payments on the judgment held by Theodore A. Crane's Sons Company, and the lien of Valk & Murdock Company by Fidelity Trust Company, the mortgage note of two hundred thousand dollars ($200,000.00) given by Farwell as aforesaid, was endorsed by the Acme Steamship Corporation and the Whitney Steamship Corporation; and to protect further Fidelity Trust Company on account of the sums advanced on the aforesaid mortgages and in the payment of the aforesaid mortgages and in the payment of the aforesaid liens the Whitney Steamship Corporation gave to Fidelity Trust Company a further bond and mortgage of one hundred fifty thousand dollars ($150,000.00) on the steamship "Henry M. Whitney."

XIV

On September 28, 1920, Joseph C. Allen, commissioner of banks for the Commonwealth of Massachusetts, acting under the provisions of chapter 399 of the Acts of 1910 of the Great and General Court of Massachusetts, and of all acts in amendment thereof and in addition thereto, for the purpose of protecting the interest of its creditors and stockholders, took possession of the property and business of Fidelity Trust Company.

XV

On March 26, 1921, Fidelity Trust Company, acting by and through said commissioner of banks, Joseph C. Allen, agreed to sell and convey (subject to the approval of the Supreme Judicial Court of Massachusetts) substantially all of its property, assets, and business to Liberty Trust Company.

38 As part of said agreement to sell there was executed an agreement and declaration of trust between Liberty Trust Company, a committee representing the stockholders of Fidelity Trust Company, and certain trustees in liquidation (herein referred to as "trustees"). The trust instrument provided that certain assets and property of Fidelity Trust Company should be conveyed by it to said trustees, in trust to liquidate the same for the benefit of Liberty Trust Company and the stockholders of Fidelity Trust Company.

On April 7, 1921, the agreement to sell was approved by the Supreme Judicial Court of Massachusetts and on April 14, 1921, certain assets and property were conveyed to the trustees. Among the assets so conveyed were the following: The mortgages on the vessels given by Farwell, the Whitney Steamship Corporation, and the Acme Steamship Corporation as aforesaid, the mortgage notes, and all right, title, and interest which Fidelity Trust Company had acquired in the judgment of Theodore A. Crane's Sons Company and in the maritime lien of Valk & Murdock Company.

The trustees, in accordance with the provisions of the above-mentioned agreement and declaration of trust, subsequently assigned and conveyed to Liberty Trust Company all assets and property received as such trustees, including those assets described in the next preceding paragragh.

XVI

39 The vessels were retained by the United States for its own use until July, 1919, and because of such retention and use just compensation is due to the parties entitled thereto. The United States Shipping Board claims that it is entitled to deduct, on account of the forwarding of the cargo as aforesaid, a sum which

is in excess of the amount which the said board is willing to pay by way of compensation for the retention and use of the vessels. The United States, therefore, has made no payment whatsoever for the requisition of the vessels.

XVII

Liberty Trust Company, as assignee of the aforesaid mortgages and mortgage notes, endorsed by the Whitney Steamship Corporation and the Acme Steamship Corporation, the partial assignee of the judgment of Theodore A. Crane's Sons Company and the assignee of the lien of Valk & Murdock Company, is entitled under the aforesaid contract of August 12, 1918, to one million twenty-three thousand forty-two and 63/100 dollars ($1,023,042.63) of any sum or sums recovered in the proceedings instituted in this honorable court by the Acme Operating Corporation.

XVIII

The mortgage to the Fidelity Trust Company on the "James S. Whitney" for $150,000.00 referred to in Article III hereof, and upon which no payment on account of principal had been made, matured April 30, 1918; the mortgage to said Fidelity Trust Company on the "Henry M. Whitney" for $200,000.00 referred to in Article IV hereof, and upon which no payment on account of principal had been made, matured June 4, 1918. The Fidelity Trust Company, as such mortgagee was, by the requisition of said vessels by the United States, as set forth in Articles VII and VIII hereof, prevented from foreclosing the aforesaid mortgages on the "James S. Whitney" and the "Henry M. Whitney" when they matured and remained unpaid.

XVIII-A

The market value of the "James S. Whitney" and "Henry M. Whitney" in April, 1918, when they were requisitioned and taken by the United States as aforesaid and during the entire period of requisition, substantially exceeded the amount of the aforesaid mortgages and of all liens and charges against said ships having priority over said mortgages. When the said ships were released from requisition July 19, 1919, and at all times thereafter said ships had no market value and by reason of the requisition as aforesaid by the United States of said ships, the security of said Fidelity Trust Company as mortgagee was rendered worthless and said Fidelity Trust Company was greatly damaged inasmuch as the respective mortgagors did not at the date of the maturity of the said mortgages or at any other time subsequent thereto have assets which said Fidelity Trust Company could come at to satisfy the debts secured by said mortgages.

XVIII–B

After the release of said "James S. Whitney" and "Henry M. Whitney" from requisition and by reason of the act of June 15, 1917 (c. 29, sec. 1, 40 Stat. 182), and the aforesaid contract of
41 August 12, 1918, Stafford and Miller, for the various corporations they controlled, and Fidelity Trust Company in 1919 and 1920 had negotiations with the United States Shipping Board for the adjustment of all claims between the parties and the United States arising out of the requisition of the said ships. Negotiations were continued until June 15, 1922, when, no agreement having been arrived at, an account stated was rendered to all parties by said board disallowing all claims. Said account showed a balance due the United States from the owners of the ships of $68,225.67. Parties being aggrieved by this result, the present proceedings are instituted.

XVIII–C

The claim of Liberty Trust Company, herein presented, as assignee of the mortgages to Fidelity Trust Company referred to in Articles III and IV hereof, is made in accordance with the provisions of the act of June 15, 1917 (c. 29, sec. 1, 40 Stat. 182).

The claim of Liberty Trust Company, herein presented, as assignee of the various claims of Fidelity Trust Company, as more fully set forth in Article XVII hereof, to be allowed to recover the amount set forth in said Article XVII from any judgment had in this proceeding by the Acme Operating Corporation for the use of said vessels by the United States during the period of requisition, is based upon the said act of June 15, 1917, and the said contract of August 12, 1918.

XIX

That no action on the claim of the petitioner has been
42 taken by Congress or any department except as stated in Article XVIII–B; that your petitioner is the sole owner of the above claim; that no assignment or transfer of same or any part thereof has been made, except as stated in this petition; that your petitioner is justly entitled to the amount claimed from the United States after allowing all just credits and offsets; that your petitioner and your petitioner's assignors are citizens of the United States and have at all times borne true allegiance to the Government of the United States and have not in any way aided, abetted, or given encouragement to rebellion against the Government of the United States; and that your petitioner believes the facts as stated in this petition to be true.

XX

Wherefore, your petitioner prays that it may be allowed to intervene and become a party to the suit in this court numbered E-260 and entitled "Acme Operating Corporation vs. The United States of America," in order that any decree of this court may protect your petitioner to the extent of its rights and remedies;

That the United States may be ordered to pay to your petitioner the principal amount due and unpaid on its mortgages, namely, $350,000.00, plus interest thereon from the respective dates of the maturity thereof;

That of any judgment awarded herein against the United States there be awarded to your petitioner, Liberty Trust Company, the sum of one million twenty-three thousand forty-two and 63/100 dollars ($1,023,042.63), with such interest thereon as the court may deem it is entitled;

43 And that your petitioner may have such further and other relief to which it may appear your petitioner is entitled.

Your petitioner further prays that a citation, to be directed to the Acme Operating Corporation and the United States of America, may be issued commanding them at a certain day to appear before this honorable court and then and there answer to the premises, and to stand to, and abide such order and decree therein as to this honorable court shall seem desirable.

LIBERTY TRUST COMPANY,
By ALLAN H. STURGES, (SEAL.),
Vice President.

[*Duly sworn to by Allan H. Sturges; jurat omitted in printing.*]

44 *Exhibit to intervening petition*

This agreement, made this 12th day of August, 1918, by and between the United States of America, by and through the United States Shipping Board, hereinafter designated as the party of the first part, and Whitney Steamship Corporation, a New York corporation, and Acme Steamship Corporation, a New York corporation, owners of the American steamers "Henry M. Whitney" and "James S. Whitney," hereinafter designated as the parties of the second part, and the Fidelity Trust Company, of Boston, hereinafter designated as the party of the third part, WITNESSETH:

WHEREAS the parties of the second part have heretofore purchased the American steamers "Henry M. Whitney" and "James S. Whitney," and have had alterations and repairs made thereon; and

WHEREAS certain cargoes have heretofore been shipped on board said steamers, consigned to Genoa, Italy, on which freight has been prepaid to the parties of the second part; and

WHEREAS the party of the first part has, under authority of law, requisitioned said steamers; and

WHEREAS to render said steamers available for the purposes for which they have been requisitioned, it has been necessary to discharge them of their cargoes and to prevent the prosecution of their intended voyages; and

WHEREAS the party of the first part is endeavoring to arrange for the forwarding of said cargoes to destination; and

WHEREAS the Fidelity Trust Company, of Boston, is the holder of mortgages upon said steamers;

NOW, THEREFORE, IT IS HEREBY AGREED as follows:

45 1. The party of the first part shall have the right, if and when it deems it practicable to use the necessary tonnage space in ships for such purpose, of which the party of the first part shall be the sole judge, to forward the cargoes (which will stand shipment) heretofore shipped on the steamers "Henry M. Whitney" and "James S. Whitney" to their respective destinations, as shown by the bills of lading heretofore issued by the parties of the second part and/or their agents.

2. In the case of any cargo being so forwarded the parties of the second part shall pay to the party of the first part, as compensation for the carrying of said cargo forward to destination, the going Shipping Board rates at the time said cargo is forwarded, and shall bear the expenses of caring for said cargo and reconditioning the same from any damage thereto, except such damage, if any, as may have been caused by the reshipment made necessary by the requisition of said steamers, and shall also bear the cost of forwarding from Charleston to New York the cargo now at Charleston intended for the steamer "James S. Whitney"; and, in party payment of the said compensation, the said expenses, the said forwarding costs, and interest thereon, the parties of the second part shall forthwith pay the party of the first part the sum of one hundred and eighty-seven thousand ($187,000) dollars. The balance of the said compensation, the said expenses, the said forwarding costs, together with interest thereon at the rate of six per cent (6%) per annum shall be repaid to the party of the first part by said party retaining and crediting against said indebtedness any and all sums that shall here-

46 after become due the parties of the second part, or any of them, by the party of the first part, as just compensation for the requisition of said steamers, or either of them.

3. In the event of the party of the first part fully reimbursing itself out of the compensation due for the requisitioning of said steamers, or either of them, for the aforesaid compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, the party of the first part shall have the right to apply any further compensation which

shall become due for the requisitioning of said steamers to the payment of any mortgages, and/or just claims constituting liens on said steamers, or either of them.

4. In the event of said steamers, or either of them, being released from said requisition, or being returned by the party of the first part to the parties of the second part, before the party of the first part shall have been fully reimbursed for the aforesaid compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, then the said party of the first part shall have and there are hereby created liens upon said steamers, and both of them, for the amount of the unpaid balance of the aforesaid compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, which amount shall be forthwith due and payable on the release of said steamers, or either of them, and which liens the parties of the second and third parts agree shall be superior to the mortgage liens of the Fidelity Trust
47 Company, of Boston, and which liens the parties of the second part agree shall be superior to any liens of the shippers and/or the consignees of cargoes for loss, damage, delay, or shortage of cargo.

5. In the event of said steamers, or either of them, being totally lost during the said requisition from any cause for which the party of the first part shall be liable for the value thereof, then the party of the first part shall have the prior right to offset against any amount for which it shall be liable to the parties of the second part for the value of said lost steamer or steamers, first, the unpaid balance of the said compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, second, the balance due upon any mortgages and/or any just claims constituting liens on said steamers, or either of them.

6. In the event of said steamers, or either of them, being insured against actual or constructive total loss by marine or war risks, and in the event of said steamers, or either of them, being lost so as to give a right of recovery under such insurance or against third parties, then the party of the first part shall be entitled to the proceeds of said insurance and/or of said recovery against third parties to the extent of the unpaid balance of the said compensation for the carrying of said cargo forward to destination, the said expenses, the said forwarding costs, and interest thereon, and the balance due upon any mortgages and/or any just claims constituting liens on said steamers, or either of them; and, to the extent of said insurance and of said recoveries against third parties, the party of the first part shall be discharged from all liability to answer for
48 the value of said steamers, or either of them, for which it would otherwise be liable under said requisition.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first herein above written.

Witness to the signature of—
O. R. HOUSTON.

UNITED STATES OF AMERICA,
By UNITED STATES SHIPPING BOARD,
By IRA A. CAMPBELL,
Party of the First Part.

Witness to the signature of—
O. R. HOUSTON.

WHITNEY STEAMSHIP CORPORATION,
By ROBERT E. MILLER,
Party of the Second Part.

Witness to the signature of—
O. R. HOUSTON.

ACME STEAMSHIP CORP.,
By ROBERT E. MILLER,
Party of the Second Part.

Witness to the signature of—
J. D. CROWELL.

FIDELITY TRUST COMPANY,
By EDWIN T. MCKNIGHT,
Party of the Third Part,
Vice-President.

For and in consideration of the execution of that certain agreement, dated at New York this 12th day of August, 1918, by and between the United States of America, by and through the United States Shipping Board, as party of the first part, and the Whitney Steamship Corporation and the Acme Steamship
49 Corporation, as parties of the second part, and the Fidelity Trust Company of Boston, as party of the third part, it is hereby agreed by and between the United States of America, by and through the United States Shipping Board, and the Fidelity Trust Company, of Boston, that the United States Shipping Board will not transport to destination any of the cargo covered by the aforesaid agreement unless the owners, or duly authorized representatives of the owners, of said cargo, shall first have executed an agreement in the form and substance attached hereto, or if such agreement be not procurable from the said cargo owners, then not unless the Fidelity Trust Company consents to such transportation.

Dated, New York, this 12th day of August, 1918.

UNITED STATES SHIPPING BOARD,
By IRA A. CAMPBELL,
Admiralty Counsel.

FIDELITY TRUST COMPANY,
By EDWIN T. MCKNIGHT,
Vice President.

NEW YORK, NEW YORK, *August 12, 1918.*

In consideration of the United States of America, through the United States Shipping Board and/or the United States Shipping Board Emergency Fleet Corporation forwarding to Genoa, Italy, the hereinafter described cargo ex the steamers "Henry M. Whitney" and/or "James S. Whitney," without requiring payment of freight therefor, the undersigned owner of the said cargo hereby releases and forever discharges the United States of America, and/or the United States Shipping Board, and/or the United States Shipping Board Emergency Fleet Corporation from any and all claims of whatsoever nature and description which the undersigned owner may have (the United States not admitting that any exist) arising from, or in connection with, the original shipment of said cargo on said steamers, and/or the requisition of said steamers, and/or from the discharge, storing, detention, reloading, and/or transporting of the said cargo to Genoa, Italy, and/or arising from any other cause of whatsoever kind now existing.

And the said undersigned owner further agrees with the United States of America, the United States Shipping Board and the Fidelity Trust Company, of Boston, that any and all of the claims and/or liens which the undersigned cargo owner may have against the said steamers, or either of them, shall be subordinated to the mortgages on the said steamers, including the principal, accrued interest, and all expenses, now or hereafter constituting claims or liens upon said vessels, and to any and all liens and/or claims which the United States of America, and/or the United States Shipping Board may have, or shall hereafter acquire, upon said steamers, or either of them, for the cost of carrying said cargo forward to destination, the cost of requisitioning the same from any damage thereto, and the cost of forwarding from Charleston to New York the cargo now at Charleston intended for the steamer "James S. Whitney," as provided in that certain agreement by and between the United States of America, by and through the United States Shipping Board, and Whitney Steamship Corporation, and Acme Steamship Corporation, the owners of said steamers "Henry M. Whitney" and/or "James S. Whitney," and the Fidelity Trust Company, of Boston, dated in New York the 12th day of August, 1918.

Accepted:

----------,

By ----------.
For cargo owner.

----------,
For United States Shipping Board.

Description of cargo:

51 V. *General traverse to amended intervening petition*

Filed August 7, 1928

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

A. C.

VI. *Submission of case on merits*

On May 11, 1931, this case was submitted on merits, without argument, by Mr. John Walsh for the plaintiff, by Messrs. Howe and Bradley for the intervenor, and by Mr. Arthur Cobb for the defendant.

52 VII. *Special findings of fact, conclusion of law, and opinion of the court by Green, J.*

Filed February 8, 1932

Mr. John Walsh for plaintiff. Messrs. Louis B. Eppstein and Ira W. Hirshfield were on the briefs.

Messrs. Howe and Bradley for the intervenor. Pillsbury, Dana, Young & Moulton were on the brief.

Mr. Arthur Cobb, with whom was Mr. Assistant Attorney General Charles B. Rugg, for defendant.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special findings of fact

1. The United States, acting through the United States Shipping Board Emergency Fleet Corporation, hereinafter termed "the Fleet Corporation," pursuant to the authority of the act of Congress of June 15, 1917, and the Executive order of July 11, 1917, requisitioned on August 3, 1917, the title to all vessels above 2,500 deadweight tons capacity, building and under contract for building in the United States; and on October 12, effective October 15, 1917, requisitioned through the United States Shipping Board, hereinafter termed "the board," the use of all vessels under the United States flag of 2,500 dwt. capacity and over.

On February 27, 1918, trans-Atlantic voyages of vessels under 2,500 dwt. capacity were interdicted, and clearance for such voyages

of vessels of less than the capacity mentioned was thereafter refused.

On or before January 28, 1918, rates for trans-Atlantic carriage of cargo were definitely prescribed by the Government, and thereafter clearance was refused vessels charging in excess of the rates fixed.

2. On October 30, 1917, Bartholomew L. Stafford and Robert E. Miller, copartners, purchased the S. S. "James S. Whitney," subject to a mortgage made on that date by A. S. Farwell, to secure a note for $150,000 payable to the Fidelity Trust Company, of Boston, Massachusetts, and at the same time executed a bill of sale transferring said vessel to the Equitable Trust Company as security for a note given by Miller and Stafford for $250,000, on which
53 was realized $240,000, the difference, $10,000, being charged and retained by the Trust Company as a bonus. Miller and Stafford borrowed from E. W. Bassick $10,000 in cash and obligated themselves to pay Bassick the further sums of $15,000, as bonus on the loan from the Fidelity Trust Company, and $10,000, as commission for negotiating for the purchase of the vessel. The $400,000 cash thus realized was turned over to Farwell and by him paid over to the Eastern Steamship Company as the purchase price of the vessel, title to which was transferred to Farwell, who in turn made transfer to Miller and Stafford.

3. On October 31, 1917, Bartholomew L. Stafford and Robert E. Miller, copartners, adopted and caused to be registered in the county of New York and for some time thereafter conducted business under the trade name of Acme Steamship Company, hereinafter termed "the copartnership."

4. It was agreed between the Equitable Trust Company and Miller and Stafford that the copartnership would manage, operate, and control the S. S. "James S. Whitney" and the S. S. "H. M. Whitney," thereafter to be purchased, and deposit in the Trust Company for the account of the copartnership all revenues collected, and that such deposits would be by the Trust Company held in trust as security for all loans and advancements made, subject, however, to the withdrawal by the copartnership upon counter-signature of Heman Dowd, one of the vice presidents of the Trust Company, of such sums as should be required for actual operating expenses, and enlarging and reconditioning the vessels; it was also agreed that the S. S. "H. M. Whitney," when acquired, should be conveyed to the Trust Company as additional security for such loans and advancements; and it was, at the time of the organization of the several corporations hereinafter mentioned, further agreed that all moneys collected for affreightment contracts on account of the vessels should be deposited with the Trust Company to the account of Acme Operating Corporation, hereinafter termed the "Operating Corporation," subject as to withdrawal of funds, to the conditions above mentioned, except that checks should bear the signature of the corporation instead of the copartnership. All freight revenues col-

lected on account of the two vessels were by the copartnership and the Operating Corporation deposited in the Trust Company in accordance with the agreement.

5. Miller and Stafford had by November 8, 1917, perfected plans for enlarging from 2,200 to approximately 3,500 dead-weight tons capacity the S. Ss. "James S. Whitney" and "H. M. Whitney."

6. On December 3, 1917, the copartnership out of funds deposited to its credit paid to the Trust Company the above-mentioned note for $250,000, and made another note payable to the Trust Company for $250,000, receiving thereon $225,000, the balance, $25,000, being charged and retained by the Trust Company as a bonus on the loan, and, at the same time, executed a bill of sale, conveying the S. S. "H. M. Whitney" to the Trust Company as security for loans and advancements, and on December 4, 1917, concluded the purchase of the S. S. "H. M. Whitney," subject to a mortgage made on that day by A. S. Farwell, to secure a note of $200,000 given the Fidelity Trust Company on which the Trust Company advanced the sum of $175,000, making a charge of and retaining $25,000 as a bonus
54 on the loan; the $400,000 cash thus received was turned over to Farwell and by him paid to the Eastern Steamship Company as the purchase price of the vessel, title to which was transferred to Farwell, who in turn made transfer to Miller and Stafford. Miller and Stafford further obligated themselves to the payment of $20,000 as commission on the purchase of the vessel.

7. The S. S. "James S. Whitney," immediately following her purchase, was brought to the yards of Theodore A. Crane's Sons Company, New York, where certain minor repairs were effected at a cost of $27,095.13, which was paid out of funds deposited to the credit of the copartnership. After leaving the yards she was loaded with a miscellaneous cargo of 1,926 long tons, consigned to various parties in Genoa, Italy, and on November 29, 1917, cleared the port of New York for Charleston, South Carolina, under permit to finish lading outward cargo.

8. Upon arrival at Charleston the S. S. "James S. Whitney" was by the copartnership docked in the yards of Valk and Murdock Company, which company enlarged the vessel in accordance with the plans mentioned in finding 5. The cost of such work amounted on April 27, 1918, to $243,664.48, of which $111,155.03 was paid, $51,155.03 out of funds deposited to the credit of the copartnership, and $60,000 out of funds deposited to the credit of the Operating Corporation. The work of enlargement was completed shortly after April 27, 1918, at a further cost of $8,200.25, which was advanced by the Fleet Corporation to Valk and Murdock Company.

9. The S. S. "H. M. Whitney," after her purchase by Miller and Stafford, was brought to the port of New York and docked in the yards of Theodore A. Crane's Sons Company, which company enlarged the vessel in accordance with the plans mentioned in finding 5, the work being completed April 10, 1918, at a cost of $369,739.90,

of which $116,099.27 was paid out of funds deposited to the credit of the copartnership.

In addition to payments made on account of enlarging the vessel, there was expended for repairs the sum of $13,705.48, of which $294.65 was disbursed from moneys deposited to the credit of the copartnership, and $13,410.83 from moneys deposited to the credit of the Operating Corporation.

10. The S. S. "James S. Whitney" was completed and launched in the year 1900 and was of 2,200 dwt. capacity. Upon leaving the yards of Valk and Murdock Company, she was of 3,090 dead-weight tons capacity, had a speed of 14 knots per hour, and was staunch, strong, and in all respects seaworthy and fit for trans-Atlantic trade.

The S. S. "H. M. Whitney" was completed and launched in the year 1890, and was of 2,200 dwt. capacity. Upon leaving the yards of Treo. A. Crane's Sons Company, she was of 3,230 dwt. capacity, had a speed of 12½ knots per hour, and was staunch, strong, and seaworthy and fit for trans-Atlantic trade. Minor repairs required by the American Bureau of Shipping were made, and the cost thereof, $965.35, was paid by the board.

11. On November 24, 1917, the copartnership petitioned the board for exemption from requisition of the S. S. "H. M. Whitney" for the purpose of making two round trips to Genoa, Italy, the revenue from which was to finance enlargement of the vessel. This
55 the board on December 6, 1917, denied. A like petition was presented December 12, 1917, with reference to the S. S. "James S. Whitney," which was also denied January 3, 1918.

12. Bartholomew L. Stafford and Robert E. Miller, in December, 1917, together with other parties not financially interested but joined for the purpose of complying with the corporation laws of the State of New York, organized, under the laws of that State, Acme Steamship Corporation, Whitney Steamship Corporation, and Acme Operating Corporation.

Robert E. Miller and Bartholomew L. Stafford owned (each fifty per cent) all the capital stock of and controlled the three corporations mentioned from the dates of their respective organizations up to and including April 23, 1919, when Robert E. Miller assigned all his stock (50% of the whole) in the Acme Operating Corporation to Bartholomew L. Stafford or his nominee, following which the stock in the Acme Operating Corporation, formerly held by Robert E. Miller was issued to Claude T. Stafford, nominee of Bartholomew L. Stafford. Subsequently Robert E. Miller owned no part of the capital stock of Acme Operating Corporation, which thereafter conducted a general shipping business, none of its operations in anywise relating to any of the matters involved in this cause.

Miller and Stafford, during the period that Miller was joint owner of the stock in the several corporations above mentioned, were respectively president and treasurer of each corporation and were at all times in absolute control of these three corporations, and the Acme Operating Corporation at the time when the charter parties

were issued to it, as hereinafter set forth, was not operated as an independent concern but merely as an agency of the Acme and Whitney Steamship Corporations, which were themselves subsidiary to and merely holding agencies of the copartnership. When the charter parties hereinafter referred to were executed by the Acme and Whitney Steamship Corporations to the Acme Operating Corporation, the latter did not actually operate the steamships for itself but operated them for the Acme Steamship Corporation and the Whitney Steamship Corporation upon a commission for its services. It paid no rental for the steamships but kept an account on its books with the Acme Steamship Corporation and the Whitney Steamship Corporation severally in which they were charged with expenses incurred on account of said steamships and credited with moneys received in connection with the operation thereof.

13. A. On January 3, 1918, immediately upon the organization of the Acme Steamship Corporation, it was agreed between the corporation and Miller and Stafford, that (1) Miller and Stafford, copartners doing business under the trade name of Acme Steamship Corporation, would convey to the corporation their equity in the S. S. "James S. Whitney," and the corporation would issue to Miller and Stafford its total capital stock; that (2) the corporation would accept the conveyance of the S. S. "J. S. Whitney" subject to two mortgages, one of $250,000 to the Equitable Trust Company, and one of $200,000 to the Fidelity Trust Company, and assume and pay these obligations; and (3) accept the vessel subject further to the charter party, the essential terms of which are set out in paragraph C below; that (4) Miller and Stafford should make such repairs
56 and improvements to the vessel as in their judgment might be necessary or desirable, their decision to be conclusive upon the corporation; and that (5) if for any reason, either by act of the Government or from other cause, Miller and Stafford should be prevented from carrying out the terms of the charter party and from retaining the amounts contracted for under the charter party to be paid to them as freight, then and in that event the corporation would repay them and they would retain out of moneys to become due it out of the charter party or collect from any other assets of the corporation an amount sufficient to cover all their expenses for repairs and for all other work performed on the vessel since the first day of November, 1917, and that the corporation become liable to repay them all sums of money which the corporation might pay or agree to pay for repairs or other work to be done upon the vessel; and that the corporation would be bound by the acts of Miller and Stafford made in good faith in making or contracting for such repairs.

B. On January 4, the day following the formal organization of Acme Steamship Corporation, there was entered into between the corporation and Miller and Stafford an agreement identical in all respects with the above-mentioned agreement between Whitney Steamship Corporation and Miller and Stafford, except that the name Whitney Steamship Corporation appears instead of the name

Acme Steamship Corporation and the name of the vessel S. S. "H. M. Whitney" appears instead of the name of the vessel S. S. "James S. Whitney," and instead of the amount of $200,000, secured by the mortgage to Fidelity Trust Company, there appears the amount of $150,000.

C. On and as of January 7, 1918, charter parties identical except as to the names of the corporations and vessels involved were executed severally between Miller and Stafford and Acme Steamship Corporation in relation to the S. S. "James S. Whitney," and between Miller and Stafford and Whitney Steamship Corporation in relation to the S. S. "H. M. Whitney," the charter parties providing "that the * * * owners agree to let, and the * * * charterers agree to hire the said steamship from the time of delivery, for about three months," and "that the charterers shall pay for the use and hire of the said vessel (46/6) forty-six shillings six pence British sterling per calendar month, commencing on and from the day of her delivery," and that the charterers should have the option of renewal for a further period of four months upon giving ten days' notice prior to the expiration of the term or of any declared option and—

"That the owners shall have a lien upon all cargoes, and all subfreights for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once,"

and in addition to the usual clauses of the standard time form of charter party (time charter, Government form, approved by the New York Produce Exchange, November 6, 1913)—

"That the charterers, in addition to the amounts provided for in paragraph 4 hereof to be paid for the use and hire of the said vessel, shall further pay for all repairs and improvements
57 made upon said vessel by them or under their direction, excepting such as are approved in writing by the owners prior to the delivery of said vessel to them as aforesaid, it being understood and agreed, however, that the delivery of said vessel shall not be considered as made until after all such reasonable repairs or improvements as said charterers may desire to make upon said vessel shall have been completed."

D. On January 5, 1918, upon the organization of the Acme Operating Corporation, Miller and Stafford had collected for freights on account of the charter party with Acme Steamship Corporation $297,675.53, and expended on account thereof $342,588.73, and had collected for freights on account of the charter party with Whitney Steamship Corporation $227,752.87, and expended on account thereof $24,302.33; had agreed with the Equitable Trust Company that all moneys received under both charter parties, excepting such as might be released by mutual agreement, should be known to Acme and Whitney Steamship Corporations and applied to the payment of the obligation to the Equitable Trust Company on account of lien

inst the S. S. " H. M. Whitney," and so advised the corporation; it was agreed between the corporation and Miller and Stafford they would transfer to the corporation the charter parties with Acme and Whitney Steamship Corporations, all claims against ne and Whitney Steamship Corporations on account of moneys ended on behalf of said corporations and on any other account ept for salaries, and their right, title, and interest in the registered le name of Acme Steamship Corporation; that the Acme Operat- Corporation would issue to Miller and Stafford 4,997 shares of capital stock, assume and pay at maturity the obligations in- red by Miller and Stafford in connection with the charter parties, ribute the proceeds of any freight moneys collected in accord- e with the agreements under the charter parties and with the itable Trust Company and promptly carry out the terms of the eements, pay to Miller and Stafford out of the corporation's ings and within twenty-four months or sooner if sufficient cash plus be accumulated the sum of $200,000, and, further, that the poration would assume any and all obligations incurred by Miller Stafford to the Acme and Whitney Steamship Corporations to e repairs and improvements upon the S. Ss. " James S." and . M. Whitney " and perform all work necessary to place the ves- in condition to carry out the charter parties.

. A. Freight revenue were collected and deposited to the unt of the copartnership, and disbursements made therefrom as ows:

	Account S. S. J. S. Whitney	Account S. S. H. M. Whitney	Total	Total
ior to Jan. 5, 1918:				
Net freight revenues	$297,675.53	$227,752.87	$525,428.40	
Expenditures	342,588.73	24,302.33	366,891.06	
Balance, Jan. 5, 1918			158,537.34	
bsequent to Jan. 5, 1918:				
Net freight revenues	164,752.54	202,612.53	367,365.07	$525,902.41
Expenditures	114,959.04	401,182.77	516,141.81	
Deferred charges			9,760.60	525,902.41

B. Freight revenues were collected subsequent to January 28, 1918, and deposited to the account of the Operating Cor- ation, and disbursements made therefrom as follows:

	Acme S/S Corporation, S. S. J. S. Whitney	Whitney S/S Corporation, S. S. H. M. Whitney	Totals
eight revenues	$188,785.83	$186,860.47	$375,646.30
ditures	181,458.85	179,533.49	360,992.34
ed charges			14,653.96
Total			375,646.30

Of the amount expended, $93,500.00 was paid to the board on account of S. S. "J. S. Whitney" and $93,500.00 to the board on account of the S. S. "H. M. Whitney."

C. During the latter part of March, 1918, a firm of accountants was employed by the Operating Corporation to open a set of books covering all transactions in respect to the S. Ss. "James S." and "H. M. Whitney," and the several corporations and the copartnership. The opening entry was of January 5, 1918, and covered transactions of Miller and Stafford from November, 1917, to that date. Subsequent to January 5 all transactions were entered as of the dates to which they related, and items were entered currently after the date on which the books were opened. The accounts in the books of the Operating Corporation stood at the end of October, 1918, as follows:

		Acme S/S Corporation, S. S. J. S. Whitney	Whitney S/S Corporation, S. S. H. M. Whitney	Totals
Net freight revenues		$651,213.90	$617,225.87	$1,268,439.77
Notes, interest, bonus, and commissions incident to purchase of vessels		294,565.00	248,011.67	
Administrative overhead		23,382.95	22,882.19	
Enlargement and repairs to vessels		150,325.76	127,729.15	
Equipment of vessels		4,083.15	10,253.17	
General operation of vessels		72,009.69	101,502.34	
Deposits to account of owning corporations		1,140.07	1,140.07	
Payment to U. S. S. Board:				
Liberty bonds	$100,551.25			
Par over cost	3,448.75			
Cash	83,000.00			
Total	187,000.00	93,500.00	93,500.00	
		639,006.62	605,018.59	1,244,025.21
Deferred charges:				
Office maintenance	12,456.88			
Legal expenses	13,872.39			
Office furniture	1,534.04			
	27,863.31			
Less credit profit on Liberty bonds	3,448.75			24,414.56
				1,268,439.77

The item, general operations, includes costs of fuel, wages of ship officers and crews, stewards' stores, deck and engine-room supplies, customs and other fees, travel incident to cargoes and vessels, insurance and bonds, brokerage, wharfage, and harbor expense, warehousing and stevedoring, and no other charge or cost.

59 15. Immediately after the purchase of the S. S. "James S. Whitney," Miller and Stafford, doing business under the copartnership name, solicited and secured contracts of affreightment for both the S. Ss. "James S." and "H. M. Whitney," issued bills of lading, and collected freight moneys therefor, and following the organization of Acme and Whitney Steamship Corporations and the Operating Corporation, secured contracts of affreightment for the vessels, issued bills of lading variously in the names of the copartnership and the several corporations, and collected freight moneys which were

deposited to the account of the copartnership up to January 28, 1918, and thereafter to the account of the Operating Corporation.

16. On April 26, 1918, the board duly passed the following resolution:

"Whereas, in view of the representations made to the board by the shipping control committee as to the urgent need by General Pershing for the immediate service of the "J. S. Whitney" and the "H. M. Whitney" for towing barges across the Atlantic, and in view of the absence of any other tonnage that would acceptably perform the service which the vessels mentioned are well equipped to render;

"And whereas it has been recommended that the vessels should be taken by the board without regard to prior commitments made by their owners and delivered to the shipping control committee to be used in pursuance of General Pershing's direction: Be it

"Resolved, That the two S. Ss. "J. S. Whitney" and "H. M. Whitney" be at once requisitioned by the board on the above basis, and delivered, free of any cargo, to the shipping control committee, to be utilized for military purposes."

17. On April 27, 1918, the balance on hand and in bank to the credit of the Operating Corporation was from all sources $256,968.71, and there were outstanding uncollected invoices rendered on account of bills of lading issued, amounting to $35,305.23. The amount in bank to the credit of Acme Steamship Corporation was $1,140,07, and to the credit of Whitney Steamship Corporation $1,140.07; these amounts were the only deposits made to the credit of these two corporations.

On April 27, 1918, the outstanding indebtedness incurred by the copartnership, the Acme and Whitney Steamship Corporations, and the Operating Corporation, amounted to $816,349.91, of which obligations in the amount of $69,082.82 were subsequently paid by the Operating Corporation, disbursements for which are included in the amounts set out in finding 14, leaving unpaid the following:

Note due April 30, 1918, to Fidelity Trust Company with accrued interest	$150,000.00
Note due June 4, 1918, to Fidelity Trust Company with accrued interest	200,000.00
Due to Valk and Murdock, enlarging S. S. James S. Whitney	132,509.45
Due to Theo. Crane's Sons Company, enlarging the S. S. H. M. Whitney	253,640.63
Due to South Carolina warehouse for storage of cargo	9,749.84
Due to Oakdene warehouse at Charleston, storage charges on cargo, approximately	1,367.17
	747,267.09

18. On April 27, 1918, the S. S. "James S. Whitney" lay in the yards of Valk & Murdock Company at Charleston, where she
60 had been for approximately four months during the progress of the work of reconditioning and enlargement. There was then owing to Valk & Murdock Company a balance of $132,509.45 on account of such work performed.

On the said day at 6.00 p. m. the United States, by and through the board and pursuant to the authority mentioned in finding 1, requisitioned the vessel; and shortly thereafter, before she had been moved, she was by the U. S. marshal arrested pursuant to a libel in rem for the aforementioned sum of $132,509.45, filed in the District Court of the United States for the Eastern District of South Carolina against the ship by Valk and Murdock Company for labor performed and materials furnished incident to the work of reconditioning and enlargement.

An interlocutory order was issued May 18, 1918, in which the court, after reciting the provisions of the above-mentioned act of June 15, 1917, relative to the payment of compensation by the United States for vessels requisitioned, ordered and decreed that, in order to protect the rights of parties having prior liens upon the vessel and who had come into court to have them adjudicated, the amount to be paid for the use of the vessel would be treated as and in lieu of the vessel itself, and that the libellants were entitled in priority to the owners to any sum or sums to be paid on account of the requisition of the vessel. On May 27, 1918, an order was entered by the court directing that the vessel be delivered to the board, and possession was forthwith taken over by the board pursuant to the requisition and order.

19. On April 29, 1918, the S. S. "H. M. Whitney" was in custody of the United States marshal for the Eastern District of New York, having been arrested pursuant to a libel theretofore filed by Theodore Crane's Sons Company for a balance due the libellant of $253,640.33 on account of reconditioning and enlarging the vessel, and a similar proceeding by Patent Vulcanite Roofing Company, Inc., for alleged damages in the amount of $100,000.

The United States, by and through the board, on April 27, 1918, and pursuant to the authority above mentioned, issued its order of requisition of the S. S. "H. M. Whitney."

Shortly thereafter the District Court of the United States for the Eastern District of New York issued an order—

"That James M. Power, United States marshal for the Eastern District of New York, be and he is hereby permitted to appoint the master of the steamship 'H. M. Whitney' as special deputy United States marshal; and that the said special deputy marshal remain in possession of said vessel for and in behalf of the said United States marshal; and that the said vessel in such custody be turned over by him to the United States Shipping Board for purposes connected with the war, the said special deputy marshal or his substitute to remain always in the possession of the said vessel; and that the said vessel be returned to the custody of marshal of this court upon being released from requisition by said United States Shipping Board."

The vessel was taken over by the board as of April 29, 1918, at one p. m.

20. Promptly after the S. S. "James S. Whitney" had been delivered by the United States marshal to the board, the vessel was

taken to New York and her cargo discharged; and promptly
61 after the S. S. "H. M. Whitney" had been taken over by the board the cargo on board was likewise discharged, and was stored in the warehouses of Pier 96, New York Harbor, the use of which was necessary for the care and preservation of the cargo and was obtained from the city of New York at a rental of $14,306.04, which was paid by the board.

The cargo from both vessels was by the Kerr Steamship Company, employed by the board for that purpose, discharged and stored in a warehouse in New York Harbor "For the account of whom it may concern," and insured for the benefit of such interests as might appear.

21. After the discharge of the cargoes from the two vessels they were equipped with towing machines and fitted for trans-Atlantic service for the Army, the work of fitting out the S. S. "James S. Whitney" being completed on June 25, 1918, and the S. S. "H. M. Whitney" on May 31, 1918, on which dates the vessels were respectively delivered to the United States Army. The "James S. Whitney" remained in the service of the Army until September, 1918, when she was returned by the Army to the board, which then turned her over to W. R. Grace & Company for operation and management, and in this service made two voyages, returning to New York Harbor May 22, 1919, where she lay until her return by the board to the Acme Steamship Corporation.

The S. S. "H. M. Whitney" remained in the service of the Army until December 26, 1918, when she was by the Army returned to the custody of the United States marshal for the Eastern District of New York, and the vessel thereafter remained in such custody, and lay in New York Harbor until her final return by the board to Whitney Steamship Corporation.

22. On August 6, 1918, the board by telegram authorized transfer of title to the vessels from Arthur A. Miller, an officer of the Equitable Trust Co., to the two steamship corporations, S. S. "James S. Whitney" to the Acme Steamship Corporation and the S. S. "H. M. Whitney" to the Whitney Steamship Corporation, and on August 7, 1918, delivered to Miller and Stafford, at the office of Acme Operating Corporation, the final draft of the contract, termed the contract of August 12, 1918, between the United States, acting through the board, Acme Steamship Corporation, Whitney Steamship Corporation, and Fidelity Trust Company.

The Operating Corporation delivered its two checks in the amount of $83,000 and 104 Liberty bonds of the par value of $1,000 each to the Equitable Trust Company for transmission to the board upon condition that the contract of August 12, 1918, be executed, and the Equitable Trust Company so advised the board.

On August 12, 1918, the contract of that date, a copy of which appears on pp. 30–34 of the intervening petition and is by reference made a part hereof, was executed between the board and the Whitney and Acme Steamship Corporations and Fidelity Trust Com-

pany. The contract, after reciting that whereas the Acme and Whitney Steamship Corporations had purchased and repaired and altered the S. Ss. "James S." and "H. M. Whitney" and there had been shipped on board the vessels certain cargoes on which the freight had been prepaid to Acme and Whitney Steamship Corporations, and the Government had requisitioned the vessels
62 pursuant to law and it was necessary in carrying out the purpose of the requisitions that the cargoes be discharged and the intended voyages prevented, and the board was endeavoring to arrange for forwarding the cargoes to their destination, and Fidelity Trust Company was the holder of mortgages upon the vessels, provides, among other clauses relating to loss of vessels and not material herein:

That (1) the board would when practicable forward to their destination such cargoes as would stand shipment; that (2) Acme and Whitney Steamship Corporations would pay compensation therefor to the board at the going board rates at time of shipment, bear the cost of forwarding from Charleston to New York the cargo intended for the S. S. "James S. Whitney," and bear the expense of caring for the cargoes and "the cost of reconditioning the same from any damages thereto," except such damages as may have been caused by reshipment necessitated by the requisitions; and in part payment therefor Acme and Whitney Steamship Corporations would forthwith pay to the board $187,000, the balance with 6% interest to be paid by retention by the board and crediting against the indebtedness all sums that might become due to either or both of the steamship corporations as just compensation for the requisitions; that (3) the board, if the amount of compensation due for the requisitions should exceed the sum necessary fully to reimburse itself, should have the right to apply such excess to the payment of any mortgages and/or liens on either of the vessels; that (4) if, before the Government should have been fully reimbursed and paid for the abovementioned carriage of cargo and expenses, either of the vessels should be released from requisition or returned to the Acme or Whitney Steamship Corporations, the Government should have liens on the vessels superior to the mortgages of the Fidelity Trust Company and any liens of shippers or consignees of cargoes and for the amount of any unpaid balance which on release of the vessels should become immediately due and payable.

On the same day, August 12, 1918, there was executed by the board and Fidelity Trust Company an agreement the provisions of which were essentially that the board would not transport any of the cargo covered by the contract of August 12, 1918, without the consent of the Fidelity Trust Company, unless and until the owners of the various cargoes should first execute an agreement which would provide that the cargo owner release the board from all claims arising from original shipment of cargo or the requisition of the vessels and discharge, storage, detention, reloading, or transportation of cargo to

Genoa or from any other cause, and that any claims or liens which the owner might have against either of the vessels should be subordinated to the mortgages on such vessel, including principal and interest and to any liens and claims which the board might have or acquire on either of the vessels for the cost of carrying the cargo to destination or reconditioning the same or of transportation from Charleston to New York of cargo intended for the S. S. "James S. Whitney."

On August 12, 1918, the Equitable Trust Company forwarded to the board check for $83,000 and 104 third Liberty loan bonds of the par value of $1,000 each, stating that payment was for the account of Acme and Whitney Steamship Corporations and in full
63 discharge of the obligations of the Equitable Trust Company to the Operating Corporation under instructions contained in its letter of that day; and on the same day Arthur A. Miller conveyed title to the S. Ss. "James S." and "H. M. Whitney" to Acme Steamship Corporation and Whitney Steamship Corporation, respectively.

On December 4, 1918, there were executed nunc pro tunc, the one as of April 27, 1918, and the other as of April 28, 1918, requisition charter parties, on standard U. S. S. B. Charter Form No. 2, respectively, between the board and Acme Steamship Corporation covering the S. S. "James S. Whitney," and between the board and Whitney Steamship Corporation covering the S. S. "H. M. Whitney." Both vessels were operated by the board on bare-boat basis. The charter parties, among other clauses not material to the controversy, provided:

"In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this requisition charter in full satisfaction of any and all claims he has or may have against the United States arising out of the requisition and accepts the compensation herein provided for as the just compensation required by law; provided, however, that the acceptance of this requisition charter shall be without prejudice to the claim, if any, the owner may have against the United States arising out of recoveries against the owner by third parties on the vessel's commitments."

At the time of the execution of the above-mentioned charter parties, R. E. Miller executed under oath and filed with the board two affidavits, one as president of the Acme Steamship Corporation and in respect to the S. S. "James S. Whitney," and the other as president of Whitney Steamship Corporation, and in respect to the S. S. "H. M. Whitney," stating in each of the affidavits that he had charge of commitments covering the vessel during the time previous to her requisition, and that at the time of her requisition the vessel was under no commitment.

23. The copartnership had made commitments for the S. S. "James S. Whitney" of 8,146,936 lbs., or 3,637.025 tons, of cargo on

which freight had been collected in the sum of $589,043.80, but, after the vessel had sailed from New York to Charleston, 1,553,793 lbs., or 693.66 tons, of cargo and freights collected thereon in the amount of $104,409.78 were transferred from the account of that vessel to that of the S. S. " H. M. Whitney," and at the time of the requisition there was on the books of the Operating Corporation assigned to the S. S. "James S. Whitney " 6,593,143 lbs., or 2,943.67 tons, of cargo and freights collected thereon in the amount of $484,634.02.

At the time of the requisition of the S. S. " H. M. Whitney " there was on the books of the Operating Corporation assigned to the vessel 11,658,870 lbs., or 5,204.85 tons, of cargo on which there had been collected freight in the amount of $809,104.09, including, in addition to the above-mentioned cargo and freight moneys transferred from the account of the S. S. " James S. Whitney," several lots of cargo covered by commitments for shipment at the option of the copartnership on either the S. S. " James S." or " H. M. Whitney " or substitute vessels and on which freight moneys in the amount of $124,340.21 had been collected.

64 Of the 18,252,013 pounds of goods appearing on the freight records of the copartnership and/or the Operating Corporation as assembled in warehouses and/or loaded on the S. Ss. " James S." and " H. M. Whitney," 1,546,510 pounds, or 690.41 tons, of the gross allocation of cargo to the S. S. " H. M. Whitney " were, on demand of the shippers, returned to the consignors and the freight charges thereon either not collected or refunded, such refunds amounting to $25,298.34; 137,568 pounds of the goods were lost, 17,750 pounds by fire and 119,496 pounds by leakage and corrosion of containers, and there were shortages by reason of errors in original weights and short shipments amounting to 155,318 pounds. The remaining lots of goods, 16,412,939 pounds, the board forwarded to the consignees and paid the carriers therefor $703,560.33.

In discharging the cargoes on board the S. Ss. " James S." and " H. M. Whitney " at the time of the requisitions in the care and protection of such cargoes and goods assembled and stored, as mentioned in findings 20 and 22 in warehouses in New York and Charleston, and in loading for transport by the board, the board expended in addition to the amount $14,306.04, set out in finding 20, $145,494.06 on account of the items and in the amounts following:

Watchmen and guards for protection of goods stored on Pier 63 for shipment on S. Ss. James S. and H. M. Whitney	$1,514.00
Trucking goods in Charleston from warehouses to dock for shipment	172.49
Cleaning pier in New York after shipment of goods, being required by the city of New York	75.20
Warehouse charges for storage and care of goods by the copartnership in Charleston	11,117.01
To the Operating Corporation for storage on Pier 63 of goods for shipment on S. S. H. M. Whitney	6,277.50
Expenditures made in reloading on S. S. James S. Whitney approximately 810 tons of goods removed while vessel was in yard of Valk & Murdock for enlargement	5,807.19

To Kerr Steamship Company for reimbursement of expenditures as follows:

	James S. Whitney	H. M. Whitney	
Discharging and loading cargo	$4,276.24	$10,695.35	
Cooperage	1,183.42	631.93	
Storage and wharfage	30,270.43	816.75	
Insurance on cargo	4,147.01	25,448.30	
Lighterage, towage, cartage	11,662.31	13,366.02	
Watchmen	464.00	3,703.50	
Miscellaneous—clerical work, cleaning piers, incidental labor, etc	2,323.76	1,541.75	
	54,327.07	56,203.60	$110,530.67
To Kerr Steamship Company for services			10,000.00

The board received as freight moneys from shippers of goods assembled and stored, as referred to in finding 22, at Pier 63, the sum of $32,370.44.

24. Subsequent to the delivery of the S. S. "H. M. Whitney" by the board to Whitney Steamship Corporation, the board, at the request and for the account of said corporation and as also requested by the Fidelity Trust Company, employed and maintained on board the vessel watchmen and a ship's crew from July 8, 1919, to August 11, 1919, pending adjustment by said corporation and Trust Company of certain claims against the vessel, and expended for wages, pilotage, and towage in such care of the vessel the sum of $1,038.45.

65 Both vessels were, by the owners, subsequent to delivery by the board, the S. S. "James S. Whitney" on July 10 and the S. S. "H. M. Whitney" on July 22, 1919, placed in the dock of Robins Dry Dock and Repair Company, Erie Basin, New York Harbor, for repairs and reconditioning and were later removed, the S. S. "James S. Whitney" on August 29 and the S. S. "H. M. Whitney" on September 30, 1919, from the dry dock by Arthur L. Crowley, agent of the owners and Fidelity Trust Company.

Subsequent to the delivery of the vessels by the board, Robert S. Haight, consulting engineer and ship surveyor, rendered a bill against the vessels and owners for services in the sum of $511.60, which was approved by the owners and by Fidelity Trust Company, paid, and charged, one-half each to the two corporations.

After delivery of the S. S. "James S. Whitney" the Fidelity Trust Company advanced and paid for the account of Acme Steamship Corporation $55,377.26 to various parties for sundry services and materials in connection with the said ship.

After delivery of the S. S. "H. M. Whitney" the Fidelity Trust Company advanced and paid for the account of Whitney Steamship Corporation $81,087.50 to various parties for sundry services and materials in connection with said steamship.

The payments made on these steamships are made up of various items nearly all of which are expenses for direct repairs; $39,676.64 was paid the Robins Dry Dock & Repair Company for repairs made on the "James S. Whitney," and $42,401.33 was paid the same repair company for the same kind of services on the "H. M.

Whitney." There are some payments for surveys, which apparently were necessary to determine the amount of repairs, and an item on each steamship for port insurance, which appears to have been a necessary expense while the ships were being repaired; $3,000 was paid for two lifeboats and fittings in connection therewith for the "James S. Whitney," and $4,165 was paid for two lifeboats and connections and some other items for the "H. M. Whitney." There is nothing in the evidence to show that any portion of these two items, totaling $7,165, was in the nature of repairs or reconditioning worn portions of the vessels.

From the date of delivery of the vessels by the defendant to Acme and Whitney Steamship Corporations, the Fidelity Trust Company, through Arthur L. Crowley, agent, operated the vessels, the S. S. "James S. Whitney" until August, 1920, and the S. S. "H. M. Whitney" until June 30, 1920, under an agreement entered into on June 30, 1919, between the parties.

The net loss from such operation of the S. S. "James S. Whitney" was, without reference to the advances of $55,377.26 mentioned above, $13,367.18; the net loss on the S. S. "H. M. Whitney" was, without reference to the advances of $81,087.50 mentioned above, $90,969.32.

25. Charter hire rates in the open world markets, among nations which imposed no limitation with respect to shipping and charter rates, were for vessels of the class of the S. Ss. "James S." and "H. M. Whitney" constantly fluctuating. In April, 1918, the rate was 41s. 4d. per dead-weight ton per month, time charter, after which there was a consistent drop until August, 1918, when
66 the rate had fallen to 33s. 6d., from which there was a consistent advance to 45s. during the months of October and November, followed by a consistent drop to 21s. 6d. in February of the following year, when the rate consistently advanced again to 26s. per dwt. per month in July, 1919. The rate of exchange between British pounds sterling and dollars was in April, 1918, $4.76 per pound, and this rate dropped uniformly until the middle of July, 1919, when the rate was $4.50 per pound sterling.

26. At various times between the first week in January and the last of April, 1919, letters were written under the caption "Acme Steamship Corporation, 11 Broadway, New York," and signed "Acme Operating Corporation, B. L. Stafford, vice president," or "Acme Operating Corporation, R. E. Miller, president," requesting that the vessels be chartered by the board to the writers, stating that the several corporations were not in position to accept the return from requisition of the vessels, owing to liens against and various indebtedness of the ships, and that the charter of the vessels would be simply a charter party such as would be made between the Government and any other corporation, and that it should not constitute a return of the vessel.

Early in April, 1919, B. L. Stafford asked and the board gave permission for him to purchase Miller's interest in the vessels.

Early in July, 1919, B. L. Stafford advised the board:

" * * * I have a one-half interest in the " James S. Whitney " and the " H. M. Whitney."

" It has been brought to my attention that statements have been emanating from Mr. Miller intended to give you the impression that such is not the case.

" I have in my possession one-half of the entire capital stock of the Whitney Steamship Corporation and one-half of the entire capital stock of the Acme Steamship Corporation * * *."

On September 30, 1919, Acme Steamship Corporation, by R. E. Miller, vice president, advised the board—

" * * * that the Acme or Whitney Steamship Corporations have no connection whatever with the Acme Operating Corporation, and also that Mr. B. L. Stafford, formerly vice president, is no longer an officer or director of these two corporations."

27. On April 23, 1919, there was executed between the Operating Corporation and the Acme Steamship Corporation an instrument the essential provisions of which were, that the Operating Corporation released Acme Steamship Corporation from all liability arising out of the operation of the S. S. " James S. Whitney " by the Operating Corporation or by reason of any charter party in relation to the vessel or on account of any improvements or alterations made thereon by the Operating Corporation or its predecessors in interest, Robert E. Miller and B. L. Stafford, or on account of any moneys expended for or on account of the vessel in any manner whatever, the release to operate as against the vessel itself as well as the parties; that the Operating Corporation assigned to the Acme Steamship Corporation all interest and claim that it might have against the vessel and further, all moneys that might be due or become due from the Government or any of its agencies by reason of taking over of the steamer by the Government, and further, any claims for damages or
67 otherwise against the Government; and that the intended purport of the agreement was to relinquish any and all right, title, interest, and claim that the Operating Corporation had in and to the steamer or against Acme Steamship Corporation.

On the same date there was executed by and between the Operating Corporation and Whitney Steamship Corporation an instrument identical in all respects and terms, excepting only that instead of Acme Steamship Corporation and S. S. " James S. Whitney," there appears in the body of the instrument Whitney Steamship Corporation and S. S. " H. M. Whitney," and of the signatures that of Whitney Steamship Corporation instead of that of Acme Steamship Corporation was subscribed.

28. On June 30, 1919, there was executed between Fidelity Trust Company, Acme Steamship Corporation, Whitney Steamship Corporation, and Arthur L. Crowley an agreement which provided that the two steamship corporations would deliver the S. S. " James S." and " H. M. Whitney " to Arthur L. Crowley for management and control, and that Crowley would accept the management and opera-

tion of the vessels at a fixed compensation and render itemized statements of receipts and disbursements to the Fidelity Trust Company, which should have the right to apply all income to the payment of the obligations against the vessels.

Following the execution of the above-mentioned agreement, the Acme and Whitney Steamship Corporations advised the board of their readiness to accept the immediate return of the S. Ss. "James S." and "H. M. Whitney." The vessels were both in need of repairs, and it was agreed between the board and the two steamship corporations that instead of the board havig the repairs made on its own account the vessels would be delivered at once, surveyed by a board of survey, consisting of representatives of the board and of the respective owners, for the purpose of "ascertaining the extent of repairs and alterations necessary to place the vessel(s) in good and satisfactory condition, ordinary wear and tear excepted," and determining the fair and reasonable cost of such repairs and alterations; that such estimated costs as agreed upon by the representatives of the parties would be by the board and the respective steamship corporations accepted as final and determinative with respect to all obligations of the board in relation to repairs on the vessels.

The S. S. "James S. Whitney" was by the board on July 10, 1919, at 7.00 a. m., delivered to Acme Steamship Corporation, and the S. S. "H. M. Whitney" was by the board on July 8, 1919, at 12.00 noon, delivered to Whitney Steamship Corporation. The board credited, against the charges made by it on account of forwarding the cargoes as above set out, charter hire at the board's prescribed requisition charter rate, the Acme Steamship Corporation on account of the S. S. "James S. Whitney" with $251,531.07, and the Whitney Steamship Corporation on account of the S. S. "H. M. Whitney" with $237,716.10.

On July 25, 28, and 31, 1919, the S. Ss. "James S." and "H. M. Whitney" were, pursuant to the above-mentioned agreement, severally surveyed by a board of survey composed of W. Scott, representing the board, and H. G. Isdale, representing, respectively,
68 the Acme Steamship Corporation and the Whitney Steamship Corporation, and the board of survey found and determined that, after an examination of each of the vessels and as per contract prices submitted and agreed upon, the fair and reasonable cost of repairing and reconditioning the vessels, including last dry docking and opening all machinery for survey, and executing voyage repairs, was, in the case of the S. S. "James S. Whitney" $35,000, and in the case of the S. S. "H. M. Whitney" $37,500, the owner in each case to be allowed, in addition to the amounts mentioned, 14 days' requisition charter hire for the time in which to execute the work.

The board credited the steamship corporations with the amounts set out in the findings of the board of survey, plus charter hire for the period specified; the total credits given were, to Acme Steamship

Corporation on account of the S. S. "James S. Whitney" $42,884.48, and to Whitney Steamship Corporation on account of the S. S. "H. M. Whitney" $44,822.36.

29. On August 16, 1918, the United States District Court for the Eastern District of New York rendered judgment in the proceedings mentioned in finding 19 for the libellant, Theodore A. Crane's Sons Company, in the sum of $260,149.87, of which $253,640.63 was for materials and work furnished and done on the S. S. "H. M. Whitney," $1,426.43 for costs, and the remainder for interest to the date of judgment. On or about the 5th day of August, 1919, the Fidelity Trust Company, at the request of the Acme and Whitney Steamship Corporations, and to protect its interest as mortgagee and prevent the sale of the S. S. "H. M. Whitney" for satisfaction of the above-mentioned judgment and further proceedings and sale of the S. S. "James S. Whitney," pursuant to the libel proceedings of Valk and Murdock Company, mentioned in finding 18, entered into agreements severally with Theodore Crane's Sons Company and Valk and Murdock Company for the purchase of their several claims against the respective vessels. In the agreements it was provided that, upon the payment of various installments, Theodore Crane's Sons Company and, likewise, Valk and Murdock Company would assign to Fidelity Trust Company that proportion of their respective claims that the amounts paid would bear to the total amount of such claims. Fidelity Trust Company made payments to Theodore Crane's Sons Company in the sum of and received therefrom assignments of claim in the amount of $206,526.10, and made payments in the amount of $132,519.45 to and received from Valk and Murdock Company an assignment of its claim and all rights incident to the action filed in court on account thereof, Valk and Murdock Company writing off and charging to profit and loss, after the failure of the Trust Company, the balance of $10,263.48.

In return for the above-mentioned payments by Fidelity Trust Company the two notes given by A. S. Farwell to Fidelity Trust Company, one for $150,000 secured by a mortgage on the S. S. "James S. Whitney," and one for $200,000 secured by a mortgage on the S. S. "H. M. Whitney," were endorsed by the Acme and Whitney Steamship Corporations, and as additional security there was given to the Fidelity Trust Company by Acme Steamship Corporation a further bond of $200,000 secured by an additional
69 mortgage on the S. S. "James S. Whitney," and by Whitney Steamship Corporation a further bond of $150,000 secured by an additional mortgage on the S. S. "H. M. Whitney."

On September 28, 1920, the Fidelity Trust Company not having liquid funds with which to meet its current obligations was, together with its business and assets, taken over by the commissioner of banks for the Commonwealth of Massachusetts acting pursuant to the laws of the State. On March 26, 1921, Fidelity Trust Company, acting

through the commissioner of banks, agreed to sell and did on April 7th, 1921, after due approval by the Supreme Judicial Court of Massachusetts, sell, assign, and transfer to the Liberty Trust Company, the Intervenor herein, certain assets and property including the above-mentioned mortgages on the S. Ss. "James S." and "H. M. Whitney," made and given by A. S. Farwell and Acme and Whitney Steamship Corporations, the mortgage notes, and all right, title, and interest of Fidelity Trust Company in and to the above-mentioned judgment of Theodore A. Crane's Sons Company and the claim and lien of the Valk and Murdock Company.

30. Bartholomew L. Stafford and Robert E. Miller did not, either in their own names or in the names of Acme Steamship Company, or otherwise, file a copartnership income-tax return with the collector of internal revenue for either of the calendar years 1917, 1918, or 1919. Acme Steamship Corporation, Acme Operating Corporation, and Whitney Steamship Corporation severally filed with the collector of internal revenue income-tax returns for the years 1917 and 1918 and Acme Steamship Corporation for the year 1919, in which each of said corporations reported no income for the years mentioned.

No income-tax return was filed by Whitney Steamship Corporation for the year 1919. The Operating Corporation filed its income-tax return with the collector of internal revenue for the year 1919, setting out both substantial income and expenses, none of the items of which in any way related either to the S. S. "James S. Whitney" or the S. S. "H. M. Whitney" or to any matter pertaining to this cause; and further set out in said report the following:

Schedule K

No balance sheet for Jan. 1st, 1919, can be furnished, as at that date the books of account were not those of the Acme Operating Corp., but were kept as agents for the steamship corps. referred to in the attached letter.

B. L. STAFFORD, *President.*

ACME OPERATING CORPORATION,
11 BROADWAY, NEW YORK,
Feb. 14th, 1920.

The Acme Operating Corporation, which was incorporated Jan. 1918, in the State of New York, did no real business prior to May, 1919. Before that date the corp. acted as agents for the Whitney and the Acme Steamship Corps.

The Government requisitioned the boats and money on hand so that the Acme Operating Corp. received nothing for service
70 rendered, except office expense and not all of that. All claims against the Acme and Whitney Steamship Corps. were cancelled, as they had no money and no prospect of ever having any.

The stock of the Acme Operating Corp. has no par value, nor has it ever been traded in. All the stock is held by myself, by power of attorney, and no money or other form of payment has been made on it.

B. L. STAFFORD, *President.*

BLS/AF

Robert E. Miller, in his income-tax return for the calendar year 1917, reported: Name and address of employer, Acme Steamship Corporation, 11 Broadway; gross income, $7,500. And in his income-tax return for the calendar year 1918 reported: Occupation, president; name and address of employer, Acme Operating Corporation, 11 Broadway; gross income, $11,744.95.

Bartholomew L. Stafford, in his income-tax return for the calendar year 1917 reported: Occupation, steamship broker; name and address of employer, "in business for myself"; gross income, $9,321.84. And in his income-tax return for the calendar year 1918 reported: Occupation, steamship business, 11 Broadway, and gross income, $24,231.97.

31. At the time of the delivery of the S. S. "James S. Whitney" to the United States by the Acme Steamship Corporation she had on board coal of the value of $297.50, and at the time of her return by the defendant to Acme Steamship Corporation she had on board fuel and water of the value of $1,020.50 and stores and equipment of an inventory value of $3,540.34 less than at the time of her original delivery to defendant.

At the time of the delivery of the S. S. "H. M. Whitney" by Whitney Steamship Corporation to the United States she had on board coal of the value of $2,989.23, and at the time of her return by defendant to Whitney Steamship Corporation she had on board stores and equipment of an inventory value of $4,035.08 greater than at the time of her original delivery to defendant.

On each of said vessels the board had installed suitable radio equipment, and this equipment was, at the request of the respective owners of the vessels, delivered with the vessels. The value of this equipment at the time of delivery was in the case of each vessel $800.00.

32. At the time of the aforementioned requisitions in April, 1918, the American market value of the S. Ss. "James S. Whitney" and "H. M. Whitney," the vessels being in all respects staunch, strong, seaworthy, and in good repair, was, respectively, $544,000 and $500,000; the American market value of the vessels, in like condition and state of repair, in July, 1919, when they were by the defendant returned to their respective owners, Acme Steamship Corporation and Whitney Steamship Corporation, was, the S. S. "James S. Whitney" $482,000 and the S. S. "H. M. Whitney" $436,000.00.

33. During the year 1919, and subsequently, there were a number of conferences between the representatives of the Fidelity Trust

and of the Shipping Board looking toward a settlement of the claims of the several parties to the transactions involving the S. Ss. "James S. Whitney" and "H. M. Whitney." On November 21, 1919,
71 a formal proposition of settlement was jointly submitted to the board by "Acme Steamship Corporation, owner of S. S. 'James S. Whitney,'" "Whitney Steamship Corporation, owner of S. S. 'H. M. Whitney,'" and "Fidelity Trust Company, mortgagee," negotiations in respect to which continued through February, 1921, and for some time thereafter; but the proposition for settlement was finally rejected by the board.

During the course of negotiations and conferences between Messrs. R. E. Miller and Bartholomew L. Stafford, representing the several corporations and interests owned and controlled by them, and representatives of the Fidelity Trust Company and representatives of the board and Fleet Corporation, various records and figures were assembled and submitted and statements of account rendered from time to time by the parties; but owing to the widely scattered and enormous volume of documents incident to the transactions, complete figures and records were not assembled and available until some time during the year 1926, when, finally, under date of November 1, 1926, after the various figures and records, both of the board and of the several other interests involved, had been assembled, there was prepared by the general comptroller of the Fleet Corporation a final statement of account, and is in summary form as follows:

Items	Acme and Whitney Steamship Corporations Dr.	Cr.
Paid on account of S. S. James S. Whitney to Valk & Murdock Co	$8,200.25	
Paid for cost of repairs ordered by American Bureau of Shipping, April 19, 1918, S. S. H. M. Whitney	965.35	
Payment of freight on cargoes shipped for account of Acme and Whitney S. S. Corporations	703,560.33	
Payment of costs of discharging the cargoes from the S. Ss. James S. and H. M. Whitney, care and loading for shipment of such cargoes and various lots of freight assembled and stored in warehouses for shipment by the owners and agents of the vessels	159,800.10	
Paid for maintaining watchmen and crew on S. S. H. M. Whitney from July 8 to August 11, 1919, at the request and for the account of Whitney S. S. Corp	1,038.45	
Value of wireless equipment delivered with S. Ss. James S. and H. M. Whitney by the board to Acme and Whitney S. S. Corporations	1,600.00	
Stores, supplies, and equipment on board H. M. Whitney at the time of return by the board in excess of such stores and supplies at time of requisition	1,045.85	
Part payment to the board by Acme Operating Corp. through Equitable Trust Company for account of Acme and Whitney S. S. Corps. of cost of discharging cargoes from the S. Ss. James S. and H. M. Whitney, caring for and forwarding cargoes and freight stored in New York for shipment	----------	$187,000.00
Freight moneys collected by the board from shippers who had not paid the owners or agents of the vessels	----------	32,370.44

	Items	Acme and Whitney Steamship Corporations Dr.	Cr.
	Charter hire S. S. James S. Whitney, April 27, 1918, 6.30 p. m., to July 10, 1919, 7 a. m., the vessel being of 3,090 dwt. capacity and a speed of 14 knots, at $5.65 per dwt. per month	----------	$251,535.07
	Charter hire S. S. H. M. Whitney, April 29, 1918, 1 p. m., to July 8, 1918, 12.00 m., the vessel being of 3,230 dwt. capacity and speed of 12½ knots, at $5.15 per dwt. per month	----------	237,716.10
72	Amount found by boards of survey due to the owners by the board for repairs on the vessels at the time of return from requisition:		
	Account of S. S. James S. Whitney		42,884.48
	Account S. S. H. M. Whitney		44,822.36
	Stores, supplies, and equipment on board S. S. James S. Whitney at time of requisition in excess of such stores, supplies, and equipment at the time of her return		2,817.34
		$876,210.33	799,141.79

The above account is found to be correct.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and it is ordered that its petition be dismissed. The court further decides that the intervenor herein is entitled to recover the sum of $129,299.76, with interest as stated below.

It is therefore ordered and adjudged that the intervenor recover of and from the United States the sum of one hundred twenty-nine thousand two hundred ninety-nine dollars and seventy-six cents ($129,299.76), with interest at the rate of six per cent per annum from October 1, 1919, to the date of judgment herein, February 8, 1932.

Opinion

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff bases its suit upon allegations which may in general terms be stated to be that the defendant has taken property belonging to the plaintiff by reason of which plaintiff seeks to recover just compensation. The property alleged to have been taken is an interest in two vessels acquired through charter parties executed to the plaintiff in the manner hereinafter set forth.

The parties to the action have made a stipulation as to the facts which is about 170 closely typewritten pages in length and which would fill about the same number of printed pages of the size ordinarily used in briefs. This statement has been somewhat condensed in the findings of fact, in which we have included everything we consider might be material. As stated in the stipulation and the findings, the facts seem extremely involved and complicated, but under the view which we take as to the law much of this matter is not material to a decision of the case.

The period of time involved in the case begins with October, 1917, when B. L. Stafford and R. E. Miller, as copartners, bought the steamships "James S. Whitney" and "H. M. Whitney," which were already subject to certain mortgages, borrowing considerable sums of money for the purpose, and executing contracts, or giving mortgages to secure the loans so obtained. It ends in July, 1919, when the Shipping Board, which had during the World War requisitioned these two vessels for war purposes, released them to the Acme Operating Corporation, plaintiff herein. In the meantime and in December, 1917, Stafford and Miller, together with other parties not financially interested but joined for the purpose of complying with the corporation laws of the State of New York, organized the
73 Acme Steamship Corporation, the Whitney Steamship Corporation, and the Acme Operating Corporation, and subsequently became owners of fifty per cent each of the stock of the three corporations, up to April 23, 1919, when Miller assigned all his stock in the Acme Operating Corporation to Stafford, or his nominee.

Almost immediately after the organization of these corporations through contracts executed between Miller and Stafford and the steamship corporations, "the equitable title" to the S. S. "James S. Whitney" was conveyed to the Acme Steamship Corporation and "the equitable title" to the "H. M. Whitney" to the Whitney Steamship Corporation. Thereafter the two corporations severally executed charter parties upon the vessels by which the control of the steamships was transferred back to the copartnership, and finally, on January 7, 1918, these charter parties were assigned to the plaintiff herein. The basis of plaintiff's suit, as we shall see later, is the interest in the two steamships derived through these charter parties, which interest is alleged to have been damaged or injured by the action of defendant in requisitioning the vessels in the manner hereinafter explained.

In order to understand fully upon what the plaintiff's claim is based, it is necessary to state the transactions in relations to the ships more in detail. The charter parties made by the two steamship companies to the copartnership of Miller and Stafford provided, among other things, "that the * * * owners agree to let and the * * * charterers agree to hire the said steamship from the time of delivery for about three months," and "that the charterers shall pay for the use and hire of the said vessel (46/6) forty-six shillings six pence British sterling per calendar month commencing on and from the day of her delivery," and also—

"That the owners shall have a lien upon all cargoes, and all subfreights for any amounts due under this charter, and the charterers to have a lien on the ship for all moneys paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once."

These charters were dated January 7, 1918, and were made by the respective steamship companies as agents for the owners thereof.

Immediately upon the execution of these charter parties, Miller and Stafford executed an assignment thereof to the Acme Operating Corporation, and it is upon this transfer and the provision above quoted with reference to the lien which the owners shall have that the plaintiff bases its case. Books were opened by the Acme Operating Corporation covering all transactions with respect to the two steamships by the copartnership of Miller and Stafford and the three corporations mentioned. All receipts and disbursements in relation to said vessels were consolidated and carried in a single set of books.

In the meantime the S. S. "James S. Whitney" was placed in the yards of Valk and Murdock to be enlarged, which was done at a cost of over $132,000, and the S. S. "H. M. Whitney" was enlarged by Crane's Sons Company at a cost of over $253,000, on account of which libels in rem were filed by these construction companies, and through court proceedings the two steamships were taken and held by United States marshals. While these vessels were respectively in the custody of United States marshals and about April 29,
74 1918, the Shipping Board, which was a department of the Government of the United States, took possession of the two vessels under a requisition order and did not finally release them until July, 1919.

After the Shipping Board had requisitioned the vessels and on December 4, 1918, there were executed nunc pro tunc, the one as of April 27, 1918, and the other as of April 28, 1918, charter parties (bare-boat form) on standard U. S. S. B. Charter Form No. 2, respectively, between the board and Acme Steamship Corporation, covering the S. S. "James S. Whitney," and between the board and Whitney Steamship Corporation, covering the S. S. "H. M. Whitney." With reference to these charters and all through the opinion the distinction must be observed between the Acme Steamship Corporation and the Acme Operating Corporation, plaintiff herein. In these charters there were a number of agreements made by the respective parties some of which involved the expenditure of large sums of money by the Shipping Board and all pertaining directly or indirectly to what should be done with the said vessels and cargoes for which Miller and Stafford had previously issued contracts of affreightment. The most important provision in this contract reads as follows:

"In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this requisition charter in full satisfaction of any and all claims he has or may have against the United States arising out of the requisition and *accepts the compensation herein provided for as the just compensation required by law*, * * *." (Italics ours.)

Although the plaintiff was not named as a party to this contract, the defendant insists that plaintiff is bound thereby. The grounds for this contention will appear later on.

After the ships had been turned back, a controversy arose over a proper settlement by the board with the various parties having interests in these vessels. After long negotiations the comptroller of the Fleet Corporation made a final statement of the account of the Acme and Whitney Steamship Corporations with the board, from which it appeared that these corporations were indebted to the board under the contract on items amounting to $876,210.33, and that they were entitled to credit on items amounting to $799,141.79, leaving a balance in favor of the board as agent for the Government of $77,068.54, which we have found to be correct. It is obvious that if the provision of the charter party contract last above quoted is binding upon plaintiff (as we think it is for reasons hereinafter set forth), plaintiff can not recover herein. The defendant also contends that even if plaintiff is not bound by this provision it can not recover for several reasons, one of which is that in any event no property of the plaintiff was taken but at most plaintiff was merely frustrated in enforcing its liens, if it had any. These matters will next be taken up.

In order to properly consider plaintiff's case, it is necessary to state the claims made in its behalf so far as we consider they merit discussion. It should also be noted in this connection that plaintiff's suit is not based upon this contract or any of the numerous contracts executed by the parties in suit, but simply upon the claim that the Government had requisitioned certain of its property and that it was entitled to just compensation therefor. More specifically stated, the claim of the plaintiff is, as stated in argument by its counsel,
75 that under the provisions of the charter parties assigned to it[1] plaintiff had paid in advance to the Acme Steamship Corporation the sum of $295,705.07 and to the Whitney Steamship Corporation the sum of $249,151.74, which amounts were not earned under the charter parties assigned to it (plaintiff) and that it had a valid and subsisting lien against the Acme Steamship Corporation and the Whitney Steamship Corporation upon the respective steamships equal to such amounts at the time they were requisitioned, and also that at the time the vessels were returned to their owners the value thereof was much less than when they were originally requisitioned. The contention of the plaintiff is that by reason of its alleged lien upon the vessels it was entitled to just compensation for their seizure and that this just compensation would include depreciation in the market value of the vessels. The burden of proof is upon the plaintiff in the first instance, but the issues will be better understood when we state the defenses presented by the argument on behalf of the defendant. They are as follows:

(1) That defendant requisitioned nothing and took nothing from plaintiff for the reason that plaintiff was not entitled to possession of the vessels at the time they were requisitioned, or during any of the time defendant used them.

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[1] These charter parties must be distinguished from the charter parties executed with the Government December 4, 1918, and hereinabove referred to.

(2) That plaintiff made no advancements upon the vessels but simply paid out of money received on affreightment contracts, made before it received the assignment of the charter parties, certain amounts in connection with the operation of the vessels.

(3) That in no event could the plaintiff acquire a lien for any money advanced (if it did advance any) for the reason that it was bound by the contract which Miller and Stafford and the parties who conveyed the vessels made with the defendant as to what it should pay for the use of the vessels, the several corporations which Miller and Stafford organized, owned, and controlled being merely, as defendant alleges, different forms under which Miller and Stafford operated.

Some other defenses are set up by the defendant, but our conclusions with reference to those above stated are such that it will not be necessary to consider them.

The defense first stated will be first taken up, but these defenses are so intertwined that we shall not attempt to proceed with their discussion in a logical order.

Conceding for the sake of the argument that plaintiff had valid and subsisting liens upon and against the two vessels which were requisitioned, we think it can not be said that these liens were requisitioned or that the Government appropirated or used any interest which the plaintiff had in the two steamships. What the Government requisitioned and all that the Government requisitioned was the possession of the steamships, and the plaintiff did not have possession of them at the time they were taken over, but they were held by United States marshals as detailed above; nor would plaintiff have been entitled to possession if the Government had not taken them. Conceding for the sake of the argument that the plaintiff had an enforceable lien against the steamships by virtue of a
76 provision in the charter parties, the Government did not take over this lien, and if it in some way frustrated the enforcement of it in exercising its war powers the defendant is not liable by reason of such action. Had the defendant prevented the plaintiff from foreclosing a lien, a different case would have arisen, but we are not called upon to determine what the rule would have then been, for no such situation is presented by the facts in the case. If plaintiff actually had a lien on the vessels, it could have proceeded to foreclose it, and if it was then entitled to possession it may be, although we do not so decide, that the Government would be liable by reason of having taken from plaintiff this possession. But plaintiff at no time while the Government held possession of the vessels was entitled to possession by reason of its lien. It had merely the right to foreclose its lien, if it had one. Moreover, as we shall see later on, the contracts made with the Government, to which the plaintiff had assented, were such as to prevent the plaintiff's recovery herein. This makes it necessary to consider more particularly the contracts which had been entered into with reference to the two steamships.

A large number of parties were interested in the two steamships through transfers and contracts pertaining thereto. These parties were the plaintiff (the Acme Operating Corporation), the other two corporations organized by Stafford and Miller, the two trust companies which had made loans to enable Stafford and Miller to purchase the steamships and held mortgages thereon, the construction companies for whom United States marshals were holding the vessels under libel proceedings, the defendant, and others not necessary to mention, as we do not think their contracts had any bearing on the subject matter of the case. The transfers and contracts made under the direction of Miller and Stafford were so numerous and involved so many provisions that the reasonable limits of this opinion prevent all of them being set out. At this point it may be sufficient to say that by what appears to us to have been a jugglery back and forth between Miller and Stafford and the two steamship corporations created and controlled by them, the copartnership of Miller and Stafford, having acquired control of the steamships, transferred the title thereof to these corporations, finally had the charter parties executed back to themselves, and then assigned these charters to a corporation which they created and controlled, which is the plaintiff herein. After all this had been done, the construction companies who had rebuilt the vessels libeled them and seized them through court proceedings, and they were held by United States marshals when the Government requisitioned them. Following the requisitions, Miller and Stafford, representing the corporations owned and controlled by them, as well as the representatives of the consignors and owners of cargoes for the shipment of which upon the two steamships commitments, respectively, had been made, and the Trust Company entered into what is termed by the parties the contract of August 12, 1918, to which reference will hereinafter be made. This contract the plaintiff did not execute and claims it was not binding upon it, and it should be kept in mind that the construction liens upon the vessels in the end practically absorbed the whole of their value. It will be observed that the amount which the plaintiff paid out in connection with the vessels did not quite equal the amount which it
77 received from affreightment contracts, and the result of sustaining plaintiff's contention would be to enable the plaintiff to recover a very large amount from the Government for the requisition of the vessels at a time when plaintiff was not even entitled to the possession thereof and make it certain that the Trust Company would realize nothing upon its mortgages. In other words, if the claim of plaintiff is sustained, the manipulation of interests in the vessels made by Miller and Stafford would result in the plaintiff getting all of the assets now pertaining to the vessels without becoming liable for any of the just obligations against the ships in the way of mortgages. That this would be grossly inequitable is quite apparent. We will next determine whether the law will support such a conclusion.

Assuming for the purposes of the argument only that plaintiff acquired a valid and subsisting lien upon the vessels through the assignment of the charter parties, we think the principles laid down by the Supreme Court in the cases of A. W. Duckett & Co. v. United States (266 U. S. 149, 152), and Omnia Commercial Co. v. United States (261 U. S. 502) prevent any recovery based thereon.

In A. W. Duckett & Co. v. United States, supra, the Supreme Court referred to the decision in Omnia Commercial Co. v. United States, supra, which was a case wherein the Government had requisitioned the entire product of a steel company for a year and thereby made it impossible for the Omnia Company to enforce a contract for a large quantity of steel plate, which contract was made with the steel company prior to the requisition. The court held in the Omnia case that the contract was not taken but at most merely frustrated by the Government in the exercise of its war powers, and in commenting on the situation in the Omnia case the Supreme Court said in the opinion in the Duckett case supra:

"The contract was no part of the res taken and whatever might be the collateral consequences of the appropriation liability for them was not an incident of the Government's act."

This language is peculiarly appropriate to the circumstances of the case at bar.

Further on in the opinion, in connection with the intervenor's claim, we shall call attention to some special features of the Duckett case, supra.

The defendant does not even concede that plaintiff had as against the United States a valid lien on the steamships, but it is insisted by counsel in argument that the Acme Operating Corporation was merely the Acme Steamship Corporation and the Whitney Steamship Corporation under a different name and guise, that all of these corporations were controlled absolutely by Stafford and Miller, who owned all the stock therein and manipulated them at will. We think this position well taken.

That the Acme Operating Corporation was simply another name under which Miller and Stafford and the other two corporations organized by them carried on the business of owning and operating the vessels is conclusively shown by the following matters which appear in the findings of fact:

(1) Miller and Stafford each owned fifty per cent of all of the capital stock of the three corporations. Miller was the president of each corporation and Stafford the treasurer down to the time
78 when Miller assigned his stock to Stafford's nominee, which was April 23, 1919, and thereafter Stafford was in sole control by reason of himself and his nominee holding all of the stock.

(2) While the steamship companies owned the vessels separately and the operating company merely had the right to control the vessels through a charter party contract, all three of the corporations were formed at the same time and with but one purpose—that

of putting the ownership and operation of the two steamships nominally under corporate ownership and control, the corporations being actually controlled by Miller and Stafford.

(3) The manner in which the Acme Operating Corporation kept its books with reference to accounts in the names of the two steamships and the Acme Steamship Corporation and the Whitney Steamship Corporation, respectively, the manner in which the correspondence was conducted on behalf of the Operating Corporation, and the manner in which contracts of affreightment were entered into by the several corporations which Miller and Stafford had created, all tends to show that they were in fact operated as one concern.

(4) The ships were chartered by the Acme and Whitney Steamship Corporations to the plaintiff for a mere nominal sum, namely, forty-six shillings six pence British sterling (46/6) each per month. This sum is so small that it tends to show that it was never intended that the charter parties should be put into effect.

In United States v. Reading Co. (253 U. S. 26, 62), while the court held that the mere fact of ownership by the same group of stock in several corporations is not enough in itself to justify considering the two corporations as one, the court said:

"* * * where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist and will deal with them as the justice of the case may require."

The evidence shows that the Acme Operating Corporation received no money except that paid upon affreightment contracts made either by the Steamship Corporations or itself after it had acquired the charter parties under which it bases its suit. The books show that an account was kept in which the amount received on account of each steamship was placed on the credit side and all sums paid on account of each steamship on the debit side of the ledger.

No charge or credit in relation to charter hire by defendant is included in any item or appears on the books of the Acme Operating Corporation. The charter parties made a number of provisions for certain payments by each party, which would have resulted in debits and credits if the charter parties were carried out accordingly, but there is nothing in the evidence to show that any of these provisions were carried into effect.

It is true that the powers and liabilities of some of these entities, if they may be called such, were varied by the legal trappings with which they were clothed. But they were all created for one purpose, used for that purpose, and so far as matters vital to the case at bar are concerned these legal technicalities do not, in our judg-
79 ment affect the situation. It is possible that no one of the matters which we have mentioned would be sufficient by itself

and alone to show the identity of these different concerns, but all the evidence tends in the same direction and as a whole abundantly satisfies us that these corporations were mere puppets of Miller and Stafford and moved in accordance with the manner in which they pulled the strings.

In the case of Luckenbach S. S. Co. v. W. R. Grace & Co. (267 Fed. 676, 681), where the identity of the corporations was if anything less clearly established than in the instant case, it was said:

"For all practical purposes the two concerns are one, and it would be unconscionable to allow the owner of this fleet of steamers * * * to escape liability because it had turned them over a year before to a $10,000 corporation, which is simply itself in another form."

In this case, we think, it would be unconscionable to permit the plaintiff to recover when it derived any rights that it possessed from another corporation with which it was practically identical and which could not recover. In fact, there are no equities upon which the case for plaintiff can rest. Under the contract executed with the steamship corporations and the transactions as carried out in accordance therewith, an indebtedness arose in favor of the Government instead of against it.

Holding as we do that the steamship corporations and the Operating Corporation, plaintiff herein, were merely masks behind which Miller and Stafford operated, the contract made with the Government by the steamship corporations, which by its terms was a settlement of all claims against the Government for the requisition of the vessels or the use of them, was binding alike on all of these dummies which Miller and Stafford had set up and prevents a recovery by the plaintiff herein. This holding makes it unnecessary to consider many other objections urged against the recovery of plaintiff which would otherwise demand attention.

In this connection it should also be noted that on April 23, 1919, contracts were executed between the Operating Corporation on one side and the Acme Steamship Corporation and the Whitney Steamship Corporation on the other, containing provisions that released the steamship corporations from any and all liability arising out of any charter parties made with the Acme Operating Corporation, or on account of any improvements or alterations made on the vessels by the Operating Corporation, or Miller and Stafford, or by reason of any moneys expended on account of the vessels in any manner whatever, the release to operate against the vessels as well as the parties and assigning to the steamship corporations any claims which the Operating Corporation (plaintiff) might have had against the vessels, or against the Government by reason of taking over the vessels, or for damages or otherwise.

The plaintiff also claims that the vessels were not in good condition when they were returned by the Government and that a considerable sum had to be expended in repairing them, the amount of which it seeks to recover. We do not think the plaintiff is entitled

to recover on this branch of the case. In the first place, it appears that the intervenor paid out the money for reconditioning the vessels as will appear further on in the opinion and in any event the Government settled with Miller and Stafford and the corporations which nominally owned the steamships for the amount necessary to recondition them and under the principles laid down above the plaintiff was bound by this settlement.

A question also arises as to whether the court has jurisdiction of plaintiff's case under the provisions of section 2 of the suits in admiralty act, which section has been held to grant exclusive jurisdiction to the district courts in cases where merchant vessels have been requisitioned by the Government and the Government subsequently entered into a contract for the operation thereof under what is known as a requisition charter. (See Matson Navigation Co. v. United States, 284 U. S.—, decided by the Supreme Court January 4, 1932.)

The case for plaintiff has been presented by its counsel on the theory that plaintiff had entered into a charter party not with the Government but with the owners of the steamships, acquired a lien thereon by virtue of provisions in the contract, and that its rights under the lien were injured by virtue of the Government's requisition proceedings. We have held, however, that the evidence showed that plaintiff was bound by a contract which was made by other parties with the Government and which precluded any recovery by the plaintiff. This contract included, among other provisions, a charter party of the requisitioned vessels. If a judgment had been sought by the plaintiff under the provisions of this charter, it may be that we would have no jurisdiction of the case to determine it upon its merits; but we do not hold that the plaintiff is entitled to a recovery under any contract or charter made with the Government. On the contrary, we have held on the merits of the case that the contract made with the Government prevents any recovery against the defendant and that this is a sufficient reason for dismissing the petition. If we should also hold that the charter party entered into with the Government and executed nominally on behalf of the steamship companies is involved in plaintiff's case and that by reason thereof the court has no jurisdiction to act on plaintiff's petition, the same result would follow and the same order be made. We conclude therefore that it is not necessary to enter in the record more than our conclusion that plaintiff's petition should be dismissed and a judgment carrying this determination into effect.

The claim of the intervenor

In the opinion on the case of the plaintiff we have shown that the Fidelity Trust Company had prior to the requisitioning of the steamships acquired liens thereon consisting of a mortgage on the S. S. "J. S. Whitney" to secure the payment of a note for $150,000 which matured April 30, 1918, and a mortgage upon the S. S. "H. M. Whitney" to secure the payment of a note to it for $200,000

which matured June 4, 1918. In addition to the mortgages to the Fidelity Trust Company, the "J. S. Whitney" was subject to the lien of the Valk and Murdock Company for repairs in the amount of $132,509.45, and the "H. M. Whitney" was subject to the lien of the Theodore A. Crane's Sons Company for repairs in the amount of $253,640.33. The lien of the Valk and Murdock Company in whole and the lien of Crane's Sons Company in part were acquired by the Trust Company through purchase and the Trust Company through contract with the plaintiff took over the vessels, paid for
81 repairs on them, and operated them in an attempt to recoup its investments. Neither the mortgages nor the liens were ever paid and the market price of the vessels so decreased that the liens were in excess of their value. Financial difficulties beset the Trust Company and it failed. Its assets passed under the control of the commissioner of banks for the Commonwealth of Massachusetts, and while being so controlled were sold to the Liberty Trust Company, intervenor herein. This sale included the mortgages and notes above described and the interest which the Fidelity Trust Company had at the time in the liens of the construction companies above mentioned, which had, as set forth above, repaired and changed the vessels. This sale or assignment was not of such a nature as would prevent this court from taking jurisdiction of the claim of the intervenor.

The defendant, however, sets up the plea that the action of the intervenor is barred by the statute of limitations. This plea is based upon the proposition that the statute began to run at the time when the vessels were turned back by the Government. If this proposition is well founded, the plea would have to be sustained, as the intervenor's petition was not filed until February 4, 1927. But we think that in this case the statute did not begin to run against the claim of the intervenor until it was rejected by the Shipping Board.

The act under which the steamships involved in this case were requisitioned (act of June 15, 1917, c. 29, 40 Stat. 182) provided in substance that the President should fix the amount of just compensation to be received by the party whose property had been requisitioned, and that if the person entitled to compensation was not satisfied with the amount allowed he was to be paid seventy-five per cent of such amount and be entitled to sue the United States for the balance. By Executive order the President delegated the powers the act conferred upon him to the Shipping Board. The claim of the intervenor was first presented to the board in 1919, and negotiations took place between the representatives of the Fidelity Trust Company and the board with reference to a settlement of the claim. The board took no final action on the claim until sometime subsequent to February, 1921, when the claim was rejected. It will thus appear that the petition of the intervenor was filed within six years from the date of the rejection of its claim by the board. There is nothing in the evidence to show that the intervenor was guilty of any un-

reasonable delay which postponed the final decision of its claim, and, so far as the effect of the statute of limitations is concerned, the instant case is controlled by the decision in Smith v. United States (67 C. Cls. 182), wherein the construction of the statute bearing thereon is discussed at length, and under a quite similar state of facts it was held that the action was not barred by the statute of limitations.

The question of whether the intervenor is entitled to recover on the merits of its case is a novel and difficult one. As a general rule where a third party takes possession of personal or chattel property and converts it to his own use, he becomes liable for the value of the property to another party having a mortgage thereon. But the circumstances of the instant case are peculiar and necessitate the determination of a new principle for which we find no direct precedents in the authorities.

82 The intervenor rests its case largely on the ground that the mortgages were executed in Massachusetts, and insists that under the Massachusetts law the Trust Company from which it derived its rights held the legal title to the vessels, and that therefore, when the defendant took over the vessels it became responsible for any depreciation in their value. It is also insisted on behalf of the intervenor that a party who causes damage to a lien holder by preventing the foreclosure of a lien, or by causing damage to the property to which the lien attaches, or depreciation in its value, becomes liable in damages. But we need not determine just how far these rules would apply in ordinary cases where the only persons who had rights in the property involved were the mortgagor, the mortgagee, and a third party, for that is not the case before us. Nor need we consider what the effect would be in such cases under the Massachusetts rule where a third party undertook to appropriate and claim title to the property mortgaged, for, we think, it is not controlling in the case at bar. It should be especially noted that the Government did not take the titles to the steamships. It left the titles where they were before. What it took was possession of the ships, and it took this possession not from the Trust Company but from the United States marshals who respectively had custody of the vessels. The Trust Company at the time not only was not in possession of the ships but it was not even entitled to possession of the ships and did not become entitled thereto until after the Government had released the ships and the Trust Company had taken up the construction liens under which the United States marshals had previously held possession. It is urged in argument on behalf of the intervenor that it was useless for the Trust Company to foreclose its liens, because it could not take possession from the Government. It is true that the Government took possession of the ships shortly before the notes of the Trust Company became due and that the Trust Company could not obtain possession thereof until the Government had released its requisition, but it does not follow, in our opinion, that it would have been useless for the Trust

Company to foreclose its liens and take such other proceedings as were necessary for it to obtain the right to possession of the ships when they were released from Government control. That there was nothing to prevent the Trust Company from taking the proper proceedings to establish its right to possession of the ships as against all parties except the defendant, is quite evident; and this, we think, is what it should have done to protect its rights. Had it done so, it then would have been in position to plead that but for defendant's requisition it would be in possession of the ships, that the Government was taking the possession of the ships away from it, and it was being deprived thereof by the Government's action. It might then have been argued that the Government should be required to pay just compensation for depriving the Trust Company of this possession. But as the Trust Company was neither in possession of the ships nor entitled to have possession of the ships at the time the Government requisitioned them, we think it took nothing from the Trust Company thereby. It will be observed that at no time while the Government held possession of the ships was the Trust Company entitled to possession thereof if the Government released
83 them. We think, therefore, it can not be said that the Government by taking possession of the ships and holding them for a limited time deprived the Trust Company of anything, and, consequently, the intervenor has derived from the Trust Company no right to receive compensation for this action.

It may be said that the defendant, by taking possession of the vessels, had converted them to its own use for the time being at least and therefore the Trust Company or its successors were entitled to recover for such conversion. But there are numerous cases which hold that an action for trover or conversion can not be maintained unless the plaintiff not only had title, general or special, but also either the right of immediate possession or was in the actual possession of the property and was wrongfully deprived thereof by the defendant. So also it has been held that an action in trover or for conversion can not be maintained by a mortgagee unless he has possession or a right to possession of the mortgaged property. (See 11 C. J. 602, and the numerous cases cited under note 96.)

It should be especially kept in mind that the intervenor does not bring this suit to recover the value of the use of the vessels during the time that the Government held possession. What it sues for is depreciation in their market value and for injury to their condition caused by use. It would seem that as the United States marshals held possession of the vessels at the time the Government took them over, if anyone was entitled to recover on account of the Government having taken and held possession of the vessels, it would be the United States marshals and not the intervenor. But, as we have observed above, there is no suit brought for the value of the use of the vessels while the Government held them, and it is not necessary for us to determine whether such a suit could be main-

tained. What we have here is an action for depreciation in the market value of the vessels during the time that the Government held them, and so far as this action is concerned, we think, the intervenor at least is not entitled to maintain it for the reason that at that time it was not entitled to possession.

No one, we think, would claim that if the original mortgagors had kept possession of the vessels during the same period the Government held them, the mortgagors would be liable for the amount the vessels had depreciated in market value in addition to the mortgage debt. Conceding for the sake of the argument and for that purpose only that if some person had wrongfully taken from the mortgagors, or from the United States marshals, the possession of the vessels he would be liable for the depreciation thereof during the time he held them it still must be said that we have no such case here. The Government did not wrongfully take possession of the vessels. On the contrary, it took possession rightfully under the statute and under the contract which it made with the mortgagors. When it took this possession, either from the mortgagors or from the United States marshals, it took over the rights of the party who had theretofore been entitled to possession, and as far as the mortgagee was concerned it obtained the same rights by virtue of the statute which had been held by the party from whom the possession was taken. The original mortgagors, had they been in possession of the vessels at the time, could have leased them to the Government and the Government would in such circumstances be no more liable for
84 damages on account of depreciation in the market value of the vessels than would the mortgagors themselves. We think the same rule applied when the vessels were taken from the United States marshals, who had the right of possession against everyone except the Government and could not be held liable for depreciation in value of the vessels during the time they were so held in custody, and for this reason also the intervenor is not entitled to recover on this branch of its claim.

The claim of the intervenor for compensation on account of the vessels being returned in a damaged condition appears to us to stand on a different basis. We think it is clear that the defendant was liable to someone for any damage done to the vessels themselves. We do not understand counsel for defendant to dispute this general statement, but they insist that pursuant to a contract with the mortgagors the amount of damage to the vessels was agreed upon and the mortgagors given credit therefor in a settlement had with them. But we do not think this settlement disposes of the claim of the intervenor. The defendant acquired no higher right than the mortgagors could convey by contract, but the mortgagors could not convey or release any of the Trust Company's rights in the property. That was something which only the Trust Company itself could do, and although the mortgagee may not be in possession or entitled to immediate possession he may bring an action in damages for an injury to his interest in the mortgaged property. (See Adams & Frederick

Co. v. South Omaha National Bank, 123 Fed. 641, and O'Brien v. Miller, 117 Fed. 1000.) It is true that this rule only applies where possession is wrongfully taken and the property converted to the use of the wrongdoer. While the defendant did not wrongfully take possession of the vessels but took them pursuant to its war powers and under statute, it would still, as we think, be liable to pay just compensation therefor under the same principles as were the basis of the decisions last above cited. We have not undertaken, however, to determine whether these principles might in any case enable a mortgagee to recover for a depreciation in market value of the mortgaged property where a third party took possession of it temporarily and subsequently turned it back, for, we think, in any event the intervenor is not entitled to recover on this ground. But the injury to the vessels themselves was an injury to the res upon which it held a mortgage, and for such an injury, we think, the Government was liable. It is true that it gave credit to the mortgagors for the amount which the board of survey found was reasonable to pay to recondition the vessels, but, as we have heretofore shown, the mortgagors could not bind the intervenor by such a contract, and it is not a protection to the defendant. In this connection it ought to be said that a claim for damages on account of the condition in which the ships were returned is not specifically pleaded in the intervenor's petition. The intervenor has however in its petition a broad and sweeping prayer for general relief which we think is sufficient to cover this claim under the liberal rules of pleading prevailing in this court, and it should be observed in this connection that this matter is specifically argued both by the intervenor and counsel for defendant without any objection being made on account of the indefinite nature of the pleadings or motion for a more specific statement.

There remains a question as to the sufficiency of the evidence to support this claim of the intervenor. There is no direct evi-
85 dence that the amount which the intervenor seeks to recover was actually necessary to put the vessels in as good repair and condition as they were when the Government took them over, but no question is raised but what the vessels were in good condition when the Government took them. In fact, they were right out of the yards of the construction companies which had been making them over. As before stated, the mortgagors and the Shipping Board entered into a contract whereby the Shipping Board was to pay a certain amount for reconditioning each of the two vessels respectively, as fixed by the board of survey. The Government could hardly dispute that it would require at least the amount fixed by the board of survey to recondition the vessels, and this amount constitutes the greater portion of the intervenor's claim. But the actual payment for these repairs was made by the Trust Company, together with other sums paid for further reconditioning of the vessels. So far as these amounts are concerned, the Government merely credited the mortgagors with the total amount agreed upon and made no payment. It is true that the stipulation shows that the

Trust Company charged the amount so paid to the Acme and Whitney Steamship Corporations, but we think there is a reason for this in that the mortgagors, who had consented to the chartering of the vessels to the Government, might also be liable for this claim. We have already stated that we think the fact that the board of survey fixed a certain amount for the reconditioning of the vessels was sufficient to show that at least that amount was required to recondition the vessels, and while there is no direct evidence with reference to the other sums expended by the Trust Company for the same purpose we think it would be unreasonable to suppose or believe, when the liens of the construction companies and of the Trust Company so nearly approached the whole value of the vessels, that the Trust Company would expend additional sums on them if it was not reasonably necessary to put them in proper condition. The evidence shows that the Fidelity Trust Company advanced and paid $55,377.26 for sundry services and materials in connection with the S. S. "James S. Whitney" after it was delivered by the Shipping Board, and also after the delivery of the S. S. "H. M. Whitney" the Trust Company paid for sundry services and materials in connection therewith $81,087.50, making a total paid on the two steamships of $136,464.76. The various items which made up these two expenditures all appear to be necessary expenses in reconditioning the ships except a total of $7,165 expended for lifeboats. Deducting this amount, there was expended by the Trust Company for reconditioning the ships $129,299.76, which we think the intervenor is entitled to recover together with interest from October 1, 1919. Judgment will be rendered accordingly in favor of the intervenor for that amount and dismissing the plaintiff's petition.

WILLIAMS, Judge; LITTLETON, Judge; and BOOTH, Chief Justice; concur.

WHALEY, Judge, took no part in the decision of this case on account of illness.

86 VIII. *Judgment*

At a Court of Claims held in the city of Washington on the 8th day of February, A. D. 1932, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is ordered that its petition be dismissed. The court further decides that the intervenor herein is entitled to recover.

It is therefore ordered and adjudged that the intervenor, Liberty Trust Company, recover of and from the United States the sum of one hundred twenty-nine thousand two hundred ninety-nine dollars and seventy-six cents ($129,299.76), with interest at the rate of six per cent per annum from October 1, 1919, to the date of judgment herein, February 8, 1932.

IX. *Proceedings after entry of judgment*

On April 7, 1932, the plaintiff filed a motion for a new trial.

On April 7, 1932, the defendant filed a motion for a new trial with respect to the intervenor, Liberty Trust Company.

On June 15, 1932, the court overruled the plaintiff's and the defendant's motions for a new trial.

87 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed October 17, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1932

Office Supreme Court
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DEC 23 19
CHARLES ELMORE

FILE COPY

No. 319

In the Supreme Court of the United States

OCTOBER TERM, 1932

UNITED STATES, PETITIONER

v.

ACME OPERATING CORPORATION; LIBERTY TRUST COMPANY, INTERVENOR

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors	9
Summary of argument	9
Argument:	
I. The Court of Claims was without jurisdiction to enter its judgment in this case	14
A. The Act of June 15, 1917, did not confer jurisdiction since the injury on which the judgment was based was not caused by a seizure of the ships	14
B. Judgment could not be given under the general jurisdiction of the Court of Claims	18
C. The Court of Claims had no jurisdiction over the mortgagee's petition because of the provisions of the Suits in Admiralty Act	19
II. The judgment of the Court of Claims is not supported by its findings	21
III. The mortgagee is not entitled to recover on a ground not pleaded in the Court of Claims	25
IV. The mortgagee was not entitled to recover on the merits under the circumstances of this case	
A. A mortgagee not entitled to possession may not recover for injuries to the mortgaged property unless damage is wrongfully inflicted and in such case may not recover more than the amount by which his security is impaired	30
B. Even if the mortgagee might have had an action in the absence of payment to the mortgagor, no action lies in this case because the mortgagor has received full payment for the repairs	35
C. Furthermore the mortgagee is barred in this case because the payment was made to the mortgagor pursuant to the express agreement of the mortgagee	38
V. The intervenor was not entitled to recover as owner of the maritime liens	41

Page

Conclusion 42
Appendix A: Statutes involved 43–45
Appendix B 46–49

CITATIONS

Cases:

Adams & Frederick Co. v. *South Omaha Natio[illegible]ank*, 123 Fed. 641 30
Adler v. *Seaman*, 266 Fed. 828 20
Allen v. *Wright*, 134 Mass. 347 31
Arnd v. *Amling*, 53 Md. 192 35
Atkinson v. *Hewett*, 63 Wis. 396 33
Baird v. *United States*, 131 U. S. cvi, affirming 8 C. Cls. 13 27
Brig Wexford, The, 7 Fed. 674 32
Brown v. *United States*, 1 C. Cls. 377 28
Burt v. *United States*, 19 C. Cls. 120 28
Chicago v. *Tebbetts*, 104 U. S. 120 32
Clark v. *United States*, 95 U. S. 539 27
Collier v. *United States*, 173 U. S. 79 22
Craig v. *Kansas City Terminal R. Co.*, 271 Mo. 516 35
Delano v. *Smith*, 206 Mass. 365 ..... 34, 35
Duckett & Co. v. *United States*, 266 U. S. 149 17
Eggensperger v. *Lanpher*, 92 Minn. 503 36
Electric Boat Co. v. *United States*, 66 C. Cls. 333 27
Elvins v. *Delaware, & A. T. & T. Co.*, 63 N. J. L. 243 33
Field v. *Early*, 167 Mass. 449 35
Freedman's Saving Co. v. *Shepherd*, 127 U. S. 494 32
Gardner v. *Cazenove*, 1 H. & N. 423 ..... 32, 36
Goulet v. *Asseler*, 22 N. Y. 225 ..... 31, 33
Green v. *Clarke*, 12 N. Y. 343 35
Green v. *Van Buskirk*, 7 Wall. 139 34
Iowa Bridge Co. v. *Commissioner*, 39 F. (2d) 777 24
Keith v. *Burrows*, 2 App. Cas. 636 32
Luse v. *Jones*, 39 N. J. L. 707 36
Manning v. *Monaghan*, 23 N. Y. 539 31
Matson Navigation Co. v. *United States*, 284 U. S. 352 ..... 11, 16, 20
McGahan v. *Bank of Rondout*, 156 U. S. 218 31
Merritt v. *United States*, 267 U. S. 338 ..... 27, 28
Morgan v. *Gilbert*, 2 Fed. 835 ..... 31, 33
O'Brien v. *Miller*, 117 Fed. 1000 31
Planter's Bank v. *Lummus Cotton Gin Co.*, 132 S. C. 16 33
Rouse v. *Letcher*, 156 U. S. 47 20
Searle v. *Sawyer*, 127 Mass. 491 31
Storms v. *Smith*, 137 Mass. 201 31
United States v. *Buffalo Pitts Co.*, 234 U. S. 228 ..... 23, 30
United States v. *Wells*, 283 U. S. 102 24
Vandiver v. *O'Gorman*, 57 Minn. 64 35
Van Dyke v. *Grand Trunk R. Co.*, 84 Vt. 212 35
Watkins v. *Kaolin Mfg. Co.*, 131 N. C. 536 35

Cases—Continued.	Page
Wisconsin Central R. R. Co. v. *United States*, 164 U. S. 190	26
W. R. Kuhn Co., In re, 225 Fed. 13	32
Statutes:	
Judicial Code—	
Sec. 145 (U. S. C., Title 28, Sec. 250)	43
Sec. 156 (U. S. C., Title 28, Sec. 262)	43
Act of June 15, 1917, c. 29, 40 Stat. 182	44
Miscellaneous:	
American Law Institute, Restatement of Conflict of Laws, Sec. 286	34
Jones, Chattel Mortgages (5th ed.)—	
Sec. 447a	35
Sec. 449	19
Sec. 548	32
Jones, Mortgages (8th ed.)—	
Sec. 851	31
Sec. 859	31
Sedgwick, Damages (9th ed.)—	
Sec. 73	33
Sec. 497e	35
Sutherland, Damages (4th ed.), Sec. 1034	33
Williams and Bruce, Admiralty Jurisdiction and Practice (3d ed.), 38	32

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 319

THE UNITED STATES, PETITIONER

v.

ACME OPERATING CORPORATION, LIBERTY TRUST COMPANY, intervenor

---

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Claims (R. 51) is reported in 74 C. Cls. 82.

JURISDICTION

The judgment of the Court of Claims was entered February 8, 1932. (R. 66.) Motions for new trial were overruled on June 15, 1932. (R. 67.) The petition for certiorari was filed August 24, 1932, and granted October 17, 1932. (R. 69.) The

jurisdiction of the Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Court of Claims had jurisdiction to enter its judgment in this case.

2. Whether the Court of Claims has jurisdiction of a claim by a mortgagee not entitled to possession for alleged injuries by the United States to ships which it had requisitioned from the mortgagors.

3. Whether recovery may be had through the Court of Claims upon a claim for alleged injuries to property when there are no allegations of fact in the petition upon which to base such a claim.

4. Whether a mortgagee may recover against a third party for alleged injuries to the mortgaged property which are not shown to have been wrongfully inflicted.

5. Whether a mortgagee may recover for alleged injuries to the mortgaged property which do not impair its security.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra,* pp. 43–45.

STATEMENT

This action was begun as a suit by the Acme Operating Corporation for just compensation alleged to be due it as charterer of two vessels, the use of

which was requisitioned by the Government. The Liberty Trust Company intervened in the action. The facts relevant to the issues here presented may be summarized as follows:

The two ships in question, the *J. S. Whitney* and the *H. M. Whitney,* were owned, respectively, by the Acme Steamship Corporation, and the Whitney Steamship Corporation, of New York. The *J. S. Whitney* was subject to a mortgage of $150,000, and the *H. M. Whitney* was subject to a mortgage of $200,000. Those mortgages were held by the Fidelity Trust Company, of Boston, Massachusetts (predecessor in interest of the intervenor).[1] (Findings 2, 6, 13; R. 30, 31, 33.) The Acme Operating Corporation (the plaintiff in the Court of Claims), a corporation organized under the laws of New York, chartered the ships from the owners on January 7, 1918. (Findings 12, 13; R. 32–33.) About the same time the two vessels were placed in the yards of construction companies for enlargement and repair. Work was completed on April 10, 1918, in the case of the *H. M. Whitney,* and shortly after April 27, 1918, in the case of the *J. S. Whitney.* Part of the cost of this work was paid, leaving a balance of $132,509.45 due on the *J. S.*

[1] Since the claim of the respondent Liberty Trust Company is derived from the mortgages to the Fidelity Trust Company, the respondent is referred to in this brief as the mortgagee.

Whitney and of $253,640.63 on the *H. M. Whitney*. (Findings 8, 9; R. 31–32.)

On April 27, 1918, the Shipping Board requisitioned the two ships. (Findings 1, 16, 18, 19; R. 29, 37, 38.) At about the same time both ships were arrested by United States marshals under libels filed by the construction companies to recover the balances due them, and were subsequently released to the Government by orders of court. (Findings 18, 19; R. 37–38.)

On August 12, 1918, the United States (through the Shipping Board) and the owners of the ships (Acme and Whitney Steamship Corporations) executed a contract with respect to the ships, to which the Fidelity Trust Company was a party. This contract is annexed to the intervening petition (R. 24–28) and by reference is made a part of Finding 22. (R. 39–41.) It provided that expenditures by the Government in behalf of the owners, for shipment of the cargoes which were in the ships at the time of requisition, should be repaid to the Government out of the sums due the owners as just compensation for the use of the ships. If the just compensation exceeded the debt to the Government, the excess was to be applied to the payment of the mortgages and liens on the ships; but if the just compensation was less than the sum due the Government, it was to have a lien on the ships, to the extent of the difference, superior to the mortgage liens of the Fidelity Trust Company.

On December 4, 1918, requisition charter parties between the Government and the owners of the ships were executed on the standard form as of the dates of the requisitions. The charter parties provided that the owners accepted them in full satisfaction of any claims they might have against the Government arising from the requisitions. (Finding 22; R. 41.) The *H. M. Whitney* remained in the Government service until December 26, 1918, and the *J. S. Whitney* until May 22, 1919, on which respective dates the ships were placed in New York Harbor, where they remained until returned to their owners. (Finding 21; R. 39.)

On June 30, 1919, the owners of the ships agreed to deliver them to a representative of the Fidelity Trust Company to be operated for the latter's benefit. They then notified the Government of their readiness to accept the return of the ships. As they were in need of repairs, it was agreed between the Government and the owners that the vessels should be surveyed for the purpose of ascertaining the cost of placing them in satisfactory condition. The vessels were delivered to the owners on July 8, 1919, and July 10, 1919. (Finding 28; R. 46.) At that time the value of the ships in good repair was $482,000 for the *J. S. Whitney* and $436,000 for the *H. M. Whitney*. (Finding 32; R. 49.) The survey took place in the last week of July, 1919, and the cost of reconditioning the vessels was fixed at $87,706.84, which sum the Govern-

ment credited to the owners of the ships. (Finding 28; R. 46–47.)

In order to prevent the sale of the vessels, in the admiralty proceedings the Fidelity Trust Company on August 5, 1919, entered into agreements for the purchase of the libellants' claims and later received an assignment of all of one claim and of the greater part of the other. (Finding 29, R. 47.)

The ships had been placed in dry dock for repairs and reconditioning by their owners shortly after the Government returned them in July, 1919. After the completion of this work on August 29 and September 30, 1919, respectively, they were removed by the Fidelity Trust Company's representative. The Trust Company paid $55,377.26 "for sundry services and materials" in connection with the *J. S. Whitney* and $81,087.50 "for sundry services and materials" in connection with the *H. M. Whitney*. These sums were charged to the owners of the ships. Of the money so spent there was "nothing in the evidence to show that" two items, totaling $7,165, were "in the nature of repairs." (Finding 24, R. 43–44.)

In September, 1920, the Fidelity Trust Company became financially embarrassed and was taken over by the Massachusetts commissioner of banks; and in April, 1921, its assets were transferred to the present intervenor. (Finding 29; R. 47–48.)

A final accounting between the owners of the ships and the Government (not completed until 1926), which included the credit to the owners, of

the sum of $87,706.84 which had been fixed by the board of survey as the cost of reconditioning the ships, showed a balance still owing to the Government of $77,068.54. This accounting was correct. (Finding 33; R. 50–51.)

The claim of the plaintiff as charterer of the vessels was disposed of by the court on the grounds, among others, that at the time the ships were requisitioned the plaintiff neither had nor was entitled to their possession, and that the plaintiff and the owners of the ships, all of which were controlled by the same persons, were *alter egos*, so that payment of just compensation to the owners was payment to the plaintiff. With this branch of the case we are no longer concerned.

The intervenor also sought recovery as assignee of the mortgages and construction liens. It alleged that its predecessor had been prevented from foreclosing the mortgages as a result of the requisition, and that since the ships had no market value at the time they were released from requisition, the security for the mortgages had been rendered worthless. Its petition concluded with a prayer for "such further and other relief" as it might be entitled to.

The Court gave judgment in favor of the intervenor for $129,299.76, with interest at 6 per cent from October 1, 1919, to February 8, 1932. The judgment represents the sum spent by the Fidelity Trust Co. for "direct repairs" in reconditioning the ships after their return by the Government.

The principle upon which the Government's liability for this amount is predicated is not easily discernible in the opinion of the court. The court stated that the case necessitated "the determination of a new principle for which [it found] no direct precedents in the authorities." (R. 62.) It said that since the intervenor's predecessor was not entitled to possession of the ships at any time between the dates of requisition and release from Government service it could not recover compensation for the taking and therefore had no claim for the depreciation in market value. But the court said that the Government was liable to some one for the repairs made to the vessels, and that the Government's credit to the shipowners of the cost of reconditioning the ships did not protect it as against the intervenor's predecessor. Analogy was made to the case of a mortgagee not in or entitled to possession, who may recover against a third person for injuries to his interest in the mortgaged property. Although recognizing that this rule applies only where the third person acts wrongfully, and that the action of the Government in taking possession of the ships in this case was not wrongful, the court said that the same principle applied. It hurdled the difficulty that such a claim had not been pleaded by saying that the matter had been argued by the parties without objection and that the broad prayer for relief was sufficient to include this claim, and concluded by allowing recovery of repairs necessary to restore the vessels to their con-

dition when requisitioned by the Government, although a substantial portion of the "repairs" was not found to be necessary for this purpose and was merely assumed to be so in the opinion.

SPECIFICATION OF ERRORS

The Court of Claims erred:

1. In taking jurisdiction of a claim for damages sounding in tort.

2. In permitting the intervenor to recover without showing that the alleged injuries to the mortgaged property were wrongfully inflicted.

3. In granting a judgment which was not supported by the findings of the court since they do not disclose the character, purpose, or necessity of the expenditures for which recovery was had, or that these expenditures were made necessary by any act of the Government.

4. In taking jurisdiction of a claim which was not pleaded.

5. In giving judgment for the intervenor.

SUMMARY OF ARGUMENT

I

The Court of Claims did not have jurisdiction to enter judgment in this case. The injury on which the judgment was based did not result from a seizure of the ships under the authority of the Act of June 15, 1917 (*infra*, pp. 44–45), but was a consequence of the use of the ships by the United States.

That use was not pursuant to the requisition but under the terms of a charter entered into between the United States and the owners of the vessels.

The Court of Claims expressly held that the Government "took nothing" from the mortgagee by the requisition (R. 63), since the mortgagee was neither in possession of the ships nor entitled to have possession at the time of the requisition or at any time while the Government retained them. Since the Government "took nothing" from the mortgagee by the requisition, it follows that the mortgagee's injuries, if any, do not fall within the terms of the Act of June 15, 1917, allowing just compensation for a taking.

The Court of Claims did not have jurisdiction to enter its judgment in this case under its general jurisdictional statute. The mortgagee's claim does not fall within Section 145 of the Judicial Code (*infra,* p. 43) because (1) any action under that section is barred by the statute of limitations, and (2) if there is an action it sounds in tort and is, therefore, outside the jurisdiction conferred on the Court of Claims.

Even though the Court of Claims might otherwise have had jurisdiction in this case, it was without jurisdiction because of the provisions of Section 2 of the Suits in Admiralty Act. This action was originally begun in the Court of Claims by the Acme Operating Company as plaintiff against the United States. The Acme Operating Company's asserted cause of action arose upon a

charter party which it had entered into with the Government. Consequently the suit was in admiralty, and jurisdiction over it lay exclusively in the district courts of the United States. *Matson Navigation Co.* v. *United States,* 284 U. S. 352. The mortgagee's petition of intervention stands upon the original suit of the Acme Operating Company, over which there was no jurisdiction.

II

The judgment of the Court of Claims is not supported by its findings. The court's judgment was based on the facts stated in the sixth paragraph of Finding 24. (R. 43–44.) But with respect to a substantial portion of the expenditures included in this finding, it was not found that they were for repairs which were necessary to restore the vessels to their condition when they were requisitioned by the Government. This finding presented "no direct evidence" of the amount of repairs necessary. (R. 43.) There are other findings (Findings 28, 33; R. 46, 51) which are inconsistent with it.

If the mortgagee was entitled to recover at all, the burden lay on it to show what part of the expenditures were occasioned by repairs for which the Government was responsible. The findings of the Court of Claims fail to show this essential fact, and they accordingly form no basis for the court's judgment.

III

The mortgagee is not entitled to recover on a ground not pleaded in the Court of Claims. The mortgagee's petition below stated no facts and made no claim with respect to the injury to the mortgaged property for which judgment was given. The Court of Claims recognized this defect but gave judgment under the general prayer for relief in the intervenor's petition.

Liberality in pleading may not extend so far as to relieve a suitor of the necessity of setting out the facts upon which he seeks to recover. This Court has frequently stated that a judgment of the Court of Claims must be based on facts *pleaded* and proved. Even if there was enough in the petition to warrant timely amendment it would have been necessary in order to support the judgment to have alleged a cause of action long since barred by the statute of limitations. Under these circumstances the rules of pleading may not be dispensed with.

IV

If the merits of the mortgagee's claim are open for consideration, there can be no recovery. A mortgagee not entitled to possession may not recover for injuries to the mortgaged property unless damage is wrongfully inflicted and in such case may not recover more than the amount by which his security is impaired. The judgment of the court below is not based on injury to the mort-

gagee's reversion; it is for the full amount of the expenditures made by the mortgagee, which the court says were for repairs. We submit that a judgment for the full amount of the repairs in the absence of a finding that the mortgagee's security was impaired, is plainly erroneous.

Furthermore the Government's obligation to return the vessels in good repair arose under its charter and was owed primarily to the mortgagor and the satisfaction of that obligation is a bar to any action by the mortgagee. The findings show conclusively that the Government's obligation to the mortgagors was discharged in full.

Even if settlement with the mortgagor would not under all circumstances bar the mortgagee, the mortgagee is barred in this case because the payment was made to the mortgagor pursuant to the express agreement of the mortgagee that it should be so paid. The mortgagee can not assert this claim as one for just compensation and at the same time disregard the provisions of the contract which it entered into on August 12, 1918, by which it agreed that all payments on account of just compensation should be made to the mortgagors, at least to the extent of the mortgagors' indebtedness to the Government.

V

The intervenor was not entitled to recover as owner of the maritime liens. The Government took nothing with respect to these claims when it requi-

sitioned the ships. The decrees which were entered by the admiralty courts fully protected the owners of these claims. The intervenor could have enforced the claims directly against the vessels, and since it chose not to take such action, there is plainly no basis for liability against the United States.

ARGUMENT

I

THE COURT OF CLAIMS WAS WITHOUT JURISDICTION TO ENTER ITS JUDGMENT IN THIS CASE

A. The Act of June 15, 1917, did not confer jurisdiction since the injury on which the judgment was based was not caused by a seizure of the ships

The statute upon which the mortgagee apparently relies as a basis for its recovery is the Act of June 15, 1917 (*infra*, pp. 44–45). This statute authorized the President to take over the title to or the possession of any ship and provided that in such case the United States should "make just compensation therefor." This compensation was to be determined by the President or his delegate; but if the amount so determined was unsatisfactory, the claimant was entitled to be paid 75% of the award and to sue in the Court of Claims for such further amount as was necessary to make just compensation.

This statute authorized a suit in the Court of Claims for just compensation for the seizure of

any ship under its provisions. But the injury on which the judgment below was based did not result from a seizure of the ships under the authority of the Act of June 15, 1917. There was no interference with the mortgagee's title or possession, as the Government did not take title, and the mortgagee was not entitled to possession. The injury, if any, was a consequence of the use of the ships by the United States, and that use was not pursuant to the requisition, but under the terms of a charter entered into between the United States and the owners of the vessels.

On April 26, 1918, the Shipping Board adopted a resolution requisitioning the *J. S. Whitney* and the *H. M. Whitney*. (R. 37.) Had this order been carried through to its conclusions, injuries to the vessels while under requisition no doubt would have been compensable under the Act of June 15, 1917. But the ships were operated under "requisition charter parties" which were entered into between the Shipping Board and the owners of the vessels on December 4, 1918, but dated as of April 27, 1918, and April 28, 1918. (R. 41.) Recovery has been had for reconditioning the vessels upon termination of these charters. Undoubtedly, the owners of the vessels had authority to charter the vessels without consulting the mortgagee. The Court of Claims expressly recognized this in its opinion. (R. 64.) The obligation to recondition the ships upon termination of the charters arose

under the charters, and damages to the ships while under charter was not recoverable under the statute as just compensation. Cf. *Matson Navigation Co.* v. *United States,* 284 U. S. 352, 358.

It may be argued that the mortgagor had no authority to release liabilities which had already accrued in favor of the mortgagee, and that any injuries which occurred prior to December 4, 1918, the date of the requisition charters (R. 41), may be compensated for as the consequences of the requisition. But both vessels were operated under the requisition charters, the *James S. Whitney* until May 22, 1919, and the *H. M. Whitney* until December 26, 1918. (Finding 21; R. 39.) The two vessels were not returned to their owners until July 8 and 10, 1919. (Finding 28; R. 46.) There is nothing in the findings to show that either vessel was damaged before December 4, 1918, and the record is wholly consistent with the probability that the injuries occurred after December 4, 1918, while the vessels were operated under the charters. The mortgagee has, therefore, failed to sustain the burden, which was on it, to show that the injuries were the consequence of the requisition.

The Court of Claims expressly held that the Government "took nothing" from the mortgagee by the requisition (R. 63), since the mortgagee was neither in possession of the ships nor entitled to have possession of the ships at the time of the

requisition. Continuing, the Court of Claims said (R. 63):

> We think, therefore, it can not be said that the Government by taking possession of the ships and holding them for a limited time deprived the Trust Company of anything, and, consequently, the intervenor has derived from the Trust Company no right to receive compensation for this action.

Since the Government "took nothing" from the mortgagee by the requisition, it follows that the mortgagee's injuries, if any, do not fall within the terms of the Act of June 15, 1917, allowing just compensation for the taking.

The present case, we believe, is plainly distinguishable from *Duckett & Co.* v. *United States*, 266 U. S. 149, upon which the respondent relies. (Br. in Opp. 5.) In that case a lessee of piers and warehouse property who was in possession of the property, was held entitled to just compensation when the property was requisitioned. The lessee's estate under his lease was taken by the requisition, and he was held entitled to compensation for the value of his estate. But here the possessory interest alone was taken. The mortgagee was not entitled to possession and the Court of Claims has expressly held that the Government "took nothing" by the requisition. In taking over the use of the ships the Government did not appropriate the mortgage or any rights thereunder.

B. Judgment could not be given under the general jurisdiction of the Court of Claims

Section 145 of the Judicial Code (*infra*, p. 43) provides for the general jurisdiction of the Court of Claims. But the mortgagee's claim in this case does not fall within that section, because (1) any action under Section 145 of the Judicial Code is barred by the statute of limitations, and (2) if there is an action it sounds in tort and is, therefore, outside the jurisdiction conferred on the Court of Claims.

1. Section 156 of the Judicial Code (*infra*, p. 43) provides that every claim against the United States "shall be forever barred" unless the petition is filed in the Court of Claims "within six years after the claim first accrues." In this case the claim of the mortgagee accrued not later than July 8 and July 10, 1919, when the two ships were released from the custody of the Government and returned to their owners. (Finding 28; R. 46.) The mortgagee's motion to intervene was filed on December 17, 1925 (R. 15), and its petition as intervenor was not filed until February 4, 1927 (R. 16). It is thus obvious that the intervenor's petition was not filed until more than six years after the cause of action, if any, accrued, and that the Court of Claims was, therefore, without jurisdiction to enter a judgment under its general jurisdictional statute. The fact that the intervenor's claim was not rejected by the Shipping Board until some time after Febru-

ary, 1921 (Finding 33; R. 50), is immaterial, so far as the court's jurisdiction under Section 145 is concerned, for presentation of the claims to the Shipping Board was in no sense a prerequisite to an action under Section 145.

2. Furthermore, Section 145 of the Judicial Code does not confer jurisdiction because the claim upon which recovery has been had is one sounding in tort. At common law the mortgagee's cause of action for injury to the mortgaged property was trespass or trespass on the case. Jones, *Chattel Mortgages* (5th ed.), Sec. 449. The Court of Claims in its opinion repeatedly refers to the mortgagee's claim as based on "injury" to the vessels. (R. 63, 64, 65.) That the mortgagee's action is for a tort is also made plain from the argument of the question on the merits presented in Point IV of this brief below.

C. The Court of Claims had no jurisdiction over the mortgagee's petition because of the provisions of the Suits in Admiralty Act

This action was originally started in the Court of Claims by the Acme Operating Company as plaintiff against the United States. The Acme Operating Company, through an affiliated corporation, had entered into a charter party with the United States. (R. 41.) By this charter it accepted the compensation there provided and the other obligations assumed by the United States "in full satisfaction of any and all claims he has or may

have against the United States arising out of the requisition." Since the Acme Operating Company had entered into this charter, its cause of action was one in admiralty, and under Section 2 of the Suits in Admiralty Act, jurisdiction over it lay exclusively in the district courts of the United States. *Matson Navigation Co.* v. *United States,* 284 U. S. 352.

The mortgagee's petition of intervention in the Court of Claims stands no better than that of the Acme Operating Company, over which there was no jurisdiction. Except for a claim for the principal amount of the mortgages, which was denied by the court below, the mortgagee sought no independent relief in the Court of Claims. The specific prayer of the mortgagee's petition was:

> That of any judgment awarded herein against the United States there be awarded to your petitioner, Liberty Trust Company, the sum of [$1,023,042.63] * * *

Jurisdiction over the intervenor's petition must be determined by the allegations and prayer of that petition itself. It is plain that the mortgagee sought only to share in any recovery which might be allowed the Acme Operating Company. Since the Court of Claims was without jurisdiction to consider the Acme Operating Company's petition, when that petition fell, we submit, the mortgagee's petition fell with it. Cf. *Rouse* v. *Letcher,* 156 U. S. 47; *Adler* v. *Seaman,* 266 Fed. 828, 832 (C. C. A 8th).

The basis of the Court of Claims's judgment in favor of the mortgagee, it is true, is independent of any recovery by the Acme Operating Company. But no facts supporting this claim were alleged in the petition, nor did the petition contain any prayer for a judgment on that ground. This defect in the mortgagee's petition is discussed more at length in Point III below. The defect is material here, because in the absence of any allegations or prayer stating a cause of action independent of the petition of the Acme Operating Company, there was no basis for jurisdiction over the mortgagee's petition.

II

THE JUDGMENT OF THE COURT OF CLAIMS IS NOT SUPPORTED BY ITS FINDINGS

The only findings of the Court of Claims which relate to the injuries for which it allowed the mortgagee to recover are contained in the sixth paragraph of Finding 24. (R. 43–44.) These findings should be read in connection with the comments in the court's opinion (R. 66) upon the nature of the expenditures. We believe these findings are not sufficient to support the judgment, even if the court's conclusion on the substantive question be correct, since, with respect to a substantial portion of the expenditures, it is not found that they were for repairs which were necessary to restore the vessels to their condition when they were requisitioned by the Government.

The obligation, if any, for which recovery has been allowed, was to restore the ships to the condition in which they were when they were requisitioned, and the court below states that judgment has been given because of this obligation. (R. 64.) But there is nothing in Finding 24 (R. 43–44) to indicate what amount of the mortgagee's expenditures was on account of repairs occasioned by ordinary wear and tear incident to service, what amount may have been made necessary through extraordinary use of the vessels by the Government, or what amount was for replacements and renewals for which the Government was in no way responsible. The court below stated in its opinion (R. 65) that—

> There is no direct evidence that the amount which the intervenor seeks to recover was actually necessary to put the vessels in as good repair and condition as they were when the Government took them over, * * *.

But the burden was on the mortgagee to prove by direct evidence that the sums were so spent, and it has failed to sustain this burden. The assumption by the court that the sums expended were for repairs made necessary by the Government's use is not justified by Finding 24, which merely states that the expenditures were for various services and materials "nearly all of which are expenses for direct repairs." (R. 43.)

The findings of the Court of Claims are not conclusive when it appears on the face of the record that they are erroneous. *Collier* v. *United States,*

173 U. S. 79, 80–81; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, 232. We submit that that is the situation here. The Court of Claims has entered judgment for the cost of making certain repairs when it says itself (R. 65) that "there is no direct evidence" that the amount stated in its Finding 24 "was actually necessary to put the vessels in as good repair and condition as they were when the Government took them over." But the findings do contain direct evidence on this question. In Finding 28 (R. 46) it appears that the ships were surveyed by a board of survey shortly after they were returned to the owners, and that this board found that the cost of executing the necessary repairs was $72,500, plus fourteen days' charter hire, making a total of $87,706.84. This certainly was direct evidence of the cost of executing the repairs. Furthermore, this sum for repairs is included in the account set out in Finding 33 (R. 51), which the court expressly states "is found to be correct." (R. 51.) The credit in this account was in accord with the agreement between the Government and the owners to which the mortgagee was a party. (R. 39–40.)

Nor was there any basis for the court's conclusion as to how much of the expenditures included in its Finding 24 were occasioned by repairs. The only evidence before the court was a stipulation entered into between all the parties, the mortgagor, the mortgagee, and the Government. No testimony of

any sort was presented to the court. We are, of course, aware of the rule that this Court will not review evidence to determine the correctness of findings made by the Court of Claims, but nevertheless we submit that the Court of Claims is not free to make findings contrary to the terms of a stipulation, when that stipulation is the only evidence before the court.[2] Cf. *Iowa Bridge Co.* v. *Commissioner,* 39 F. (2d) 777, 780 (C. C. A. 8th).

Based on this stipulation, the parties all concurred in presenting requested findings of fact to the Court of Claims. The portion of these requested findings which relates to the injuries to the vessels involved in this case is set forth as Appendix B of this brief (*infra,* pp. 46–49). In this requested finding no distinction whatever was made between "repairs" and "renewals." Of the total sum of $136,464.76 involved in this item, $107,486.36 represents items described only as "sundry repairs and renewals." Of course, the Government was not liable for renewals to the vessels. The Government's liability was at most limited to the expense of restoring the ships to the condition they were in at the time of the requisition, and did not include liability for the complete renovation of

[2] This Court has recently stated the rule to be applied to findings of the Court of Claims as follows: "The findings of fact of the Court of Claims are to be treated like the verdict of a jury." *United States* v. *Wells,* 283 U. S. 102, 120. The verdict of a jury can not stand when there is no evidence to support it or when it is contrary to stipulated facts and there is no other evidence on the question.

ships which were more than eighteen years old when the Government took them over.

The burden of proving the facts necessary to show the Government's liability was on the mortgagee. In this case, if the mortgagee was to recover at all, the burden lay on it to show what part of the expenditures were occasioned by repairs for which the Government was responsible. The findings of the Court of Claims wholly fail to show what portion of the expenditures made by the mortgagee were necessary to restore the vessels to their condition when they were requisitioned by the Government. The finding accordingly forms no basis for the judgment of the Court of Claims.

III

THE MORTGAGEE IS NOT ENTITLED TO RECOVER ON A GROUND NOT PLEADED IN THE COURT OF CLAIMS

The judgment of the Court of Claims in this case was based on certain injuries to the mortgaged property which occurred while the ships were being operated for the United States. The mortgagee's petition in the Court of Claims stated no facts and made no claim with respect to any such injury to the mortgaged property. The Court of Claims specifically recognized this failure of the mortgagee to plead the facts upon which the judgment was based, saying (R. 65) that

> a claim for damages on account of the condition in which the ships were returned is not

specifically pleaded in the intervenor's petition.

But the Court of Claims said that the intervenor's petition contained "a broad and sweeping prayer for general relief,"[3] and held that this was sufficient under the liberal rules of pleading prevailing in the Court of Claims.[4]

It is true that the Court of Claims is not bound by special rules of pleading, and there is liberality as to the form in which facts may be pleaded. *Wisconsin Central Railroad Co.* v. *United States,* 164 U. S. 190, 212. But this liberality, of course, does not extend so far that a petitioner in the Court of Claims may wholly fail to set forth the facts upon which he seeks to recover. The requirement that

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[3] This general prayer reads as follows (R. 24):

"And that your petitioner may have such further and other relief to which it may appear your petitioner is entitled."

[4] The Court of Claims also stated that the matter was argued both by the intervenor and counsel for the Government without any objection being made to the pleadings. So far as any waiver is concerned it should be noted that the case was not argued before the Court of Claims, but was submitted. (R. 29.) In the Government's main brief in that court, there was no mention of the question; the only question raised by the intervenor which was then discussed was the right to recover the face amount of the mortgages. The question of the right of the intervenor to recover for repairs was mentioned in a reply brief for the Government to the extent of two pages (pp. 272–274), in which no cases were cited. In no sense could the material presented be deemed a waiver of the mortgagee's failure to allege any facts whatever on the question.

the petition must contain a plain statement of the facts upon which recovery is sought is expressly included in the rules of the Court of Claims. (Rule 7.) The same requirement is made by Section 156 of the Judicial Code (*infra*, p. 43), which bars any claim "unless the petition *setting forth a statement* thereof" is filed within six years. (Italics ours.) In the present case, no facts relating to the question upon which the judgment was based were pleaded.[5] Liberality in pleading should not be carried to the extent that this fundamental requirement is completely disregarded. This Court has frequently stated that a judgment of the Court of Claims must be based on the facts *pleaded* and proved. *Baird* v. *United States*, 131 U. S. cvi, cvii–cviii, affirming, 8 C. Cls. 13, 16; *Clark* v. *United States*, 95 U. S. 539, 543; *Merritt* v. *United States*, 267 U. S. 338, 341.

It is true that a judgment may be one which is not sought by the petition, but in such a case the facts upon which the judgment is based must be pleaded. A judgment may not be based upon grounds presented only in argument. *Clark* v. *United States*, 95 U. S. 539, 543, *supra*; *Electric Boat Co.* v. *United States*, 66 C. Cls. 333, 377;

[5] The intervenor's claims against the Government are set forth in paragraphs XVIII and XVIII–A of its petition. (R. 22.) The claim set out in paragraph XVIII for the amount of the mortgage notes was denied by the court below. (R. 62, 63.) The claim set out in paragraph XVIII–A for depreciation in the value of the ships was likewise denied. (R. 63, 64.) No facts to support any other claim were pleaded.

Brown v. *United States,* 1 C. Cls. 377. The judgment in the present case so far departs from the issues presented by the pleadings as to deprive the Government of notice of what the claimant intended to prove and an opportunity to present its own case. See *Merritt* v. *United States,* 267 U. S. 338, 341, *supra; Burt* v. *United States,* 19 C. Cls. 120, 122.

It is plain, we believe, that the Government was taken by surprise when the Court of Claims based its judgment on facts which were not pleaded by the mortgagee, and for which no relief was sought in the mortgagee's prayers. Had the facts in question been pleaded, it is, of course, impossible to tell what evidence the Government might have been able to present to combat them. If there had been any express agreements with the mortgagee on the subject, these agreements would have been produced and put in evidence; and there obviously may have been many other facts which might have borne on the question of the Government's liability. But the facts were not pleaded; the Government had no reason to present evidence to meet them.

That the Government was taken by surprise is shown plainly enough from the findings of the Court of Claims. The only finding upon which the amount of the judgment was based is the sixth paragraph of Finding 24. (R. 43–44.) This finding was based on a stipulation; no other evidence was introduced. (See Point II, pp. 21–25, *supra.*)

There is nothing in the finding made by the court to show what portion of the expenses incurred were necessary to restore the vessels to their condition when requisitioned by the Government. In presenting the facts to the court, no distinction was made between "renewals" and "repairs," and no effort was made to segregate injuries to the vessels occurring before December 4, 1918, the date the requisition charters were executed, and those incurred after that date. It is, of course, obvious, that if the issue had been before the Court of Claims on the pleadings, the Government would have presented the evidence so as to make these important distinctions.

Moreover, even if the facts had been fully presented to the Court of Claims, the mortgagee's position could have been protected only by allowing it to file an amended petition. But an amended petition stating these facts would clearly have raised a new cause of action, not pleaded in any way in the mortgagee's original petition. Such a new cause of action was long since barred by the statute of limitations at the time the judgment of the Court of Claims was entered, and, therefore, under Section 156 of the Judicial Code (*infra*, p. 43), the Court of Claims would have been without jurisdiction to enter a judgment on these facts even if they had been properly pleaded in an amended petition.

IV

THE MORTGAGEE WAS NOT ENTITLED TO RECOVER ON THE MERITS UNDER THE CIRCUMSTANCES OF THIS CASE

A. A mortgagee not entitled to possession may not recover for injuries to the mortgaged property unless damage is wrongfully inflicted and in such case may not recover more than the amount by which his security is impaired

Although a mortgagee who is not in possession nor entitled to possession [6] may under some circumstances have an action against a third party for injuries to the mortgaged property, we know of no case where such an action has been maintained unless the injuries were wrongfully inflicted. A mortgagee of chattels has been allowed to recover for wrongful destruction or disposition of the mortgaged property, which the third party was not privileged to make or the mortgagor to allow. But the cases allowing such recovery make it plain that they are applicable only where the injuries were wrongful. Thus in *Adams & Frederick Co.* v. *South Omaha National Bank,* 123 Fed. 641, 645 (C. C. A. 8th), one of the cases relied on by the court below (R. 65), the rule is stated as follows:

> When a third party *wrongfully* takes mortgaged property and so deals with it as to

[6] In considering the present question, cases such as *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228, where the mortgagee was in or entitled to possession must be distinguished.

> destroy the value of the mortgagee's lien, the injury which he sustains is not dependent to any extent upon the inquiry whether he was or was not in possession of the property or entitled to its possession at the time the *wrong* was done. (Italics ours.)

See *Storms* v. *Smith,* 137 Mass. 201; *Allen* v. *Wright,* 134 Mass. 347; *Manning* v. *Monaghan,* 23 N. Y. 539. When the taking is lawful, the mortgagee has no action except on a complaint properly showing an injury to his reversionary interest. *Goulet* v. *Asseler,* 22 N. Y. 225.

In the case of real estate the rule is the same and the mortgagee may recover against a third party for a severance only if the severance was wrongful. *McGahan* v. *Bank of Rondout,* 156 U. S. 218, 235; *Searle* v. *Sawyer,* 127 Mass. 491, 493. See also *O'Brien* v. *Miller,* 117 Fed. 1000 (C. C. D. Conn.), cited by the court below (R. 65); *Morgan* v. *Gilbert,* 2 Fed. 835 (C. C. W. D. Mich.); Jones, *Mortgages* (8th ed.), Secs. 851, 859.

It must be conceded that the requisition and use by the Government in this case were lawful. In the course of time ordinary wear and tear would require the reconditioning of the ship, but this was a mere incident of their lawful use. The court below conceded in its opinion (R. 64) that the mortgagors had authority to charter or lease the ships without the consent of the mortgagees. This of course was a correct statement of the law. *Keith* v.

Burrows, 2 App. Cas. 636; Jones, *Chattel Mortgages* (5th ed.), Sec. 548; Williams and Bruce, *Admiralty Jurisdiction and Practice* (3d ed.), p. 38.[7] It can not be the law that the charterer of a ship from a mortgagor who had authority to enter into the charter becomes liable to a mortgagee for injuries which are not shown to have been other than those normally incident to the ordinary use and operation of the ship.

Cases such as the present one, where the use of the ships alone was taken, must be distinguished from cases where the mortgaged property is destroyed or disposed of so that the mortgagee is wholly deprived of his interest. A case of the latter sort is *Chicago* v. *Tebbetts,* 104 U. S. 120, cited by the respondent (Br. in Opp. 7), where the mortgagee was held entitled to share in the payment made when land was condemned for a public improvement. These cases rest on the ground that the act of the third person in destroying the

[7] As corollaries of this rule it is held that when a mortgagor of a ship charters it, a mortgagee not in possession is not entitled to the freight. *The Brig Wexford,* 7 Fed. 674 (S. D. N. Y.); *Gardner* v. *Cazenove,* 1 H. & N. 423. Likewise, a mortgagee of land is not entitled to the rent when not in possession. *Freedman's Saving Co.* v. *Shepherd,* 127 U. S. 494; *In re W. R. Kuhn Co.,* 225 Fed. 13, 17, 18 (C. C. A. 3d).

mortgaged property has deprived the mortgagee of his security.

But in no case is the mortgagee entitled to recover more than the amount by which his security has been impaired. *Morgan* v. *Gilbert,* 2 Fed. 835 (C. C. W. D. Mich.), *supra; Elvins* v. *Delaware & A. T. & T. Co.,* 63 N. J. L. 243; *Goulet* v. *Asseler,* 22 N. Y. 225, *supra; Planter's Bank* v. *Lummus Cotton Gin Co.,* 132 S. C. 16; *Atkinson* v. *Hewett,* 63 Wis. 396. It is only to that extent that he has been injured; he can not recover more than the amount of his injury.[8]

The judgment of the court below is not based on injury to the mortgagee's reversion. The judgment is for the full amount of the expenditures made by the mortgagee, which the court says were for repairs. These expenditures were not necessary to protect the mortgagee's reversion unless without them the ships were not worth the amount of the mortgagee's liens. But the court has made no findings as to the extent of any injury to the mortgagee's reversion, and it has not founded its

[8] It is sometimes stated that the law of Massachusetts is an exception to this uniform rule. Sedgwick, *Damages* (9th ed.), Sec. 73; Sutherland, *Damages* (4th ed.), Sec. 1034. But there is nothing to indicate that this exceptional rule is applied to personal property even in Massachusetts.

In any event, as is pointed out below (*infra,* pp. 34–35), the Massachusetts rule is not applicable in this case.

judgment on that basis. A judgment for the full amount of the repairs in the absence of such a finding is plainly erroneous.[9]

The mortgagee places great reliance on its statement (Br. in Opp. 8) that "The mortgages were Massachusetts mortgages, executed and delivered in the Commonwealth (Findings 2, 6; Record pp. 30, 31, 62)," and seeks to bring itself within the broad rule stated in *Delano* v. *Smith,* 206 Mass. 365. But even if a State rule of damages would be binding in a Federal court, the fact that the mortgages were executed in Massachusetts would not make their effect turn on Massachusetts law. The effect of the mortgages would be governed by the law of the place where the ships were when the mortgages were executed (*Green* v. *Van Buskirk,* 7 Wall. 139; American Law Institute, *Restatement of Conflict of Laws,* Sec. 286.) There is nothing in the findings to show that the ships were in Massachusetts when the mortgages were executed, or that the ships

[9] The mortgagee seems to argue (Br. in Opp. 8) that its security was impaired. But there is no finding to this effect, and other findings tend to establish the contrary. See Finding 32 (R. 49), showing the ships were worth $918,000 in good condition when they were returned, which was somewhat more than the amount of the liens then outstanding (about $750,000; Finding 29, R. 47), plus the cost of the repairs ($129,299.76; R. 66). The mortgagee refers to interest (Br. in Opp. 8), but there is no finding as to interest. The conclusive answer to the mortgagee's argument that its security was impaired is that the Court of Claims' judgment did not rest on that ground.

were registered in Massachusetts or otherwise subject to its laws. Moreover, even if it were material, there is nothing in the findings cited by the respondent, or elsewhere, to show that the mortgages were even executed in Massachusetts. The findings state that the mortgages were executed to secure notes payable to a Massachusetts trust company; they do not state where the mortgages were executed. (Findings, 2, 6; R. 30, 31.)[10]

B. Even if the mortgagee might have had an action in the absence of payment to the mortgagor, no action lies in this case because the mortgagor has received full payment for the repairs

The law is, of course, clear that a mortgagor in possession may recover in full for any injury to the mortgaged property. *Arnd* v. *Amling,* 53 Md. 192; *Vandiver* v. *O'Gorman,* 57 Minn. 64; *Craig* v. *Kansas City Terminal R. Co.,* 271 Mo. 516; *Watkins* v. *Kaolin Mfg. Co.,* 131 N. C. 536; *Van Dyke* v. *Grand Trunk R. Co.,* 84 Vt. 212; Sedgwick, *Damages* (9th Ed.) Sec. 497e. The necessary consequence of this rule is that such a recovery by the mortgagor is a bar to a subsequent recovery by the mortgagee. *Field* v. *Early,* 167 Mass. 449; *Green* v. *Clarke,* 12 N. Y. 343; Jones, *Chattel Mortgages* (5th ed.), Sec. 447a. Otherwise, a third party

[10] Another reason why *Delano* v. *Smith*, *supra*, is inapplicable is that here the mortgagor has received payment in full for the injuries, and this is a bar to any action by the mortgagee. *Field* v. *Early*, 167 Mass. 449. This question is discussed more fully in Point IV (B), below.

would be liable twice for the same injury. *Luse* v. *Jones,* 39 N. J. L. 707, 712–713. The rule is no different when the mortgaged property is a ship. Thus, the payment of freight to a mortgagor before the mortgagee has taken possession of the ship is a bar to any action by the mortgagee. *Gardner* v. *Cazenove,* 1 H. & N. 423.

The obligation of the Government to return the ships in good repair either arose out of the Government's contract with the mortgagors, or was a consequence of the use of the ships which was a matter solely within the domain of the mortgagors so long as the mortgagees asserted no right to possession. As has been pointed out above (*supra,* pp. 31–32) the mortgagors had power to enter into the charters without the consent of the mortgagee, and this power must have included authority to place in the charters the usual and normal provisions regarding the obligation to return the ships in good repair. Furthermore, the cases make it plain that the matter of repairs is one that concerns the party in possession alone, and that a third party may deal with a mortgagor in possession without risk.[11] For all of these reasons it seems to us plain that the Government's obligation in the matter of repairs

[11] The power of the mortgagor over the subject of repairs is so fully recognized that it has been held that a mortgagee who later became entitled to possession could not charge the mortgagor with the cost of repairs, when the mortgagor had previously agreed with a lessee that the lessee would make the repairs. *Eggensperger* v. *Lanpher,* 92 Minn. 503.

was owed primarily to the mortgagor, and that the satisfaction of this obligation to the mortgagor is a bar to any action by the mortgagee.[12]

The findings in this case show conclusively that the Government's obligation to the mortgagors was discharged in full. From Finding 28 (R. 45–47) it appears that when the vessels were returned by the Shipping Board to the mortgagors "it was agreed between the board and the two steamship corporations that instead of the board having the repairs made on its own account the vessels would be delivered at once, surveyed by a board of survey" for the purpose of ascertaining the extent of the repairs necessary and determining the cost of such repairs, and that the cost so determined would be accepted by the parties "as final and determinative with respect to all obligations of the board in relation to repairs on the vessels." (R. 46.) It is a fair inference from this finding that this agreement and the steps taken pursuant to it were made with the full knowledge and consent of the mortgagee.

In less than three weeks after the ships were returned to the mortgagors they were surveyed pursuant to this agreement by a board of survey. The

[12] The mortgagee refers (Br. in opp. 7) to the statement of the court below that counsel for the Government in the Court of Claims did not dispute the statement "that the defendant was liable to some one for any damage done to the vessels themselves." (R. 64.) But because the Government was liable to some one for the damage, it does not follow that it must now pay the mortgagee for repairs, when it has already paid the mortgagor in full.

board found that the fair and reasonable cost of repairing the *James S. Whitney* was $35,000 and that the fair and reasonable cost of repairing the *H. M. Whitney* was $37,500; in each case the amount so found was to be increased by fourteen days' charter hire to allow for the time required to execute the work. (R. 46.)

Pursuant to its contract with the mortgagors and this finding by the board of survey, the Shipping Board credited the mortgagors with the amounts found due. (R. 46–47.) This payment was no less a payment because it took the form of a credit. The Government's rights can not be barred because it happened that at the time the mortgagor's indebtedness to the Government was greater than the Government's liability to the mortgagors. The credit was, in substance, payment, intended and accepted by the parties as such. This payment to the mortgagors in possession of the ships on account of repairs is a full and complete defense to the United States for any further action on account of repairs either by the mortgagors or mortgagee.

C. Furthermore the mortgagee is barred in this case because the payment was made to the mortgagor pursuant to the express agreement of the mortgagee

If settlement with a mortgagor in possession discharging an obligation to repair did not, as we contend it did, bar recovery by the mortgagee, the mortgagee in this case would nevertheless be barred

because it had agreed that payments for necessary repairs should be made to the mortgagor. On August 12, 1918, the mortgagor, the Government, *and* the mortgagee, entered into a contract. The Government agreed to forward the cargo on board the ships when they were requisitioned, for which the mortgagor had already received freights. The mortgagors agreed to pay the sum of $187,000 as part payment of the Government's forwarding expense and it was further agreed (R. 25) that the balance of this expense, together with interest, should be repaid to the Government by the Government's (R. 25)—

> retaining and crediting against said indebtedness any and all sums that shall hereafter become due the parties of the second part [the mortgagors], or any of them, by the party of the first part [the United States], as just compensation for the requisition of said steamers, or either of them.

(Finding 22; R. 39–40; incorporating by reference the contract which appears at R. 24–28.) The contract further provided that the Government should have liens superior to those of the mortgagees, if the ships were returned before the Government was fully reimbursed. (R. 26.) As has been pointed out, the mortgagee (the Fidelity Trust Company) was a party to this contract.

The credit allowed to the mortgagors on account of the repairs was made pursuant to this contract, as the indebtedness then due to the Government was

greater than the sum of $87,706.84 found by the board of survey to be due for repairs. Even after this credit, an indebtedness of $77,068.54 remained due the Government (Finding 33; R. 49–51), for which under the agreement of August 12, 1918, the lien of the Government was superior to those of the mortgagees.

The indebtedness of the Government on account of its obligation to make repairs was a sum "that shall hereafter become due the parties of the second part [the mortgagors]" within the provisions of the contract, because, as has been pointed out before in this brief, the obligation to make repairs is one which is owed primarily to the mortgagor in possession. The mortgagee may not assert its claim as one for just compensation and thus disregard the obligations of its contract by which it was agreed that all payments on account of just compensation should be made to the mortgagors, in reduction of the mortgagors' indebtedness to the Government which was to be preferred over its claims as mortgagee. By crediting the cost of the repairs to the mortgagor, the Government reduced the indebtedness due from the mortgagors and thus correspondingly reduced the extent of its superior lien. Thus, under the terms of the contract the credit to the mortgagors was a direct benefit to the mortgagee and improved the lien of the mortgagee by eliminating to that extent the Government's superior lien which the mortgagee had granted by the contract.

Since the credit to the mortgagors was allowed pursuant to an express contract, to which the mortgagee was a party, and since this credit operated to reduce liens superior to the liens held by the mortgagee, it must follow that the mortgagee in this case is not entitled to any further recovery from the Government.

V

THE INTERVENOR WAS NOT ENTITLED TO RECOVER AS OWNER OF THE MARITIME LIENS

Shortly after the vessels were returned by the Shipping Board to the owners, the Fidelity Trust Co., predecessor of the intervenor, purchased the claims which were held against the vessels by various construction companies. The court below did not grant judgment on the basis of these claims. We contend that the intervenor's position in the Court of Claims was not aided by its ownership of the construction claims.

The right to enforce these claims against the vessels was obviously a right in admiralty over which the Court of Claims had no jurisdiction. Nor did the ownership of these claims give the intervenor a right to recover under the Act of June 15, 1917 (*infra*, pp. 44–45). The Government took nothing with respect to these claims when it requisitioned the ships. The decrees which were entered by the admiralty courts fully protected the owners of the claims. (Findings 18, 19; R. 38.) When the vessels were returned to the owners, the mari-

time lienors could have enforced their claims in full. The amount of these claims was $386,150.08, plus interest (Finding 18, R. 37; Finding 29, R. 47), and the vessels when returned to the owners were worth $918,000 (Finding 32, R. 49). It was in order to prevent the enforcement of these liens that the intervenor's predecessor purchased the claims. (Finding 29, R. 47.)

The intervenor obviously is not entitled to recover as owner of these claims, since it could have enforced them directly against the vessels. Instead of taking that action, it chose to operate the vessels in an effort to realize not only the amount of the claims but profits as well. For all that appears in the record, the intervenor still holds the maritime claims, and may now enforce them against the ships. In this situation, there is plainly no basis for liability against the United States.

CONCLUSION

The decision of the Court of Claims is erroneous and should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General,
CHARLES B. RUGG,
Assistant Attorney General,
ERWIN N. GRISWOLD,
ARTHUR COBB,
JESSE R. FILLMAN,
Attorneys.

DECEMBER, 1932.

APPENDIX A

STATUTES INVOLVED

Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250) provides in part as follows:

> SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *.

Section 156 of the Judicial Code (U. S. C., Title 28, Sec. 262), provides as follows:

> SEC. 156. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided,* That the claims of married women,

first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

The Act of June 15, 1917, c. 29, 40 Stat. 182, provides in part as follows:

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

* * * * *

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

* * * * *

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provision hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be

entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

151232—32——4

APPENDIX B

In the Court of Claims of the United States

No. E–260

ACME OPERATING COMPANY

v.

THE UNITED STATES

DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCURRENCE THEREIN BY PLAINTIFF AND INTERVENER

Introductory.—All of the facts incident to this cause have been stipulated by the parties. The stipulation covers one hundred and seventy-seven pages of closely typewritten matter and as many more pages of documents filed as exhibits and by reference made part of the stipulation. The recitals in the stipulation and the documents referred to are too voluminous for inclusion as a whole in the findings.

The defendant considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the special findings of fact, requests that the Court find the same as follows:

* * * * * * *

FINDING XXVI

* * * * * * *

After delivery of the S. S. *James S. Whitney,* the Fidelity Trust Company advanced and paid for the account of Acme Steamship Corporation $55,377.26, to the parties and in the amounts following:

On account of S. S. James S. Whitney

American Bureau of Shipping, for survey June 27, Sept. 22, and July 20, 1919	$157.40
Parsons & Eggert, port-risk insurance, Aug. 23 to Sept. 7, 1919	369.65
M. G. Isdale, for survey while in dry dock	700.00
Lidgerwood Mfg. Co., for steam reversing ship winch engines	3,860.00
Robins Dry Dock and Repair Company, for removing 4 old winches and installing new ones	2,000.00
For smoothing top of midship accommodation and fitting new canvas with three coats of paint; furnishing and installing canvas covers on towing machines and furnishing and installing 1½" scupper, port and starboard side of forecastle draining bilges, and overhauling 10 lights	3,540.00
For supplying and fitting one metal lifeboat on each side of vessel with necessary platforms, davit and gear complete, boats accommodating 18 persons	3,000.00
Furnishing and installing repeating telegraph from bridge to engine room	290.00
Supplying fresh water	320.00
P. S. Thorsen & Co., Inc., for repairs to pipes and boiler	1,463.57
Robins Dry Dock & Repair Company for sundry repairs and renewals	39,676.64

After delivery of the S. S. *H. M. Whitney,* the Fidelity Trust Company advanced and paid for the account of Whitney Steamship Corporation $81,087.50, to the parties and in the amounts following:

On account of S. S. H. M. Whitney

American Bureau of Shipping for survey and duplicate certificates	$234.75
M. G. Isdale for survey while in dry dock	70.00
Parsons and Eggert, for port insurance from Aug. 23, 1919, to Oct. 7, 1919	1,045.80

Leonard Miller Co., Inc., for painting	$3,221.82
W. F. Tribble, for adjusting compasses	50.00
United Marine Contracting Corporation, for cleaning bilges, loading stores, removing ashes, removing coal from hatches to bunkers, and cleaning and painting boiler, etc.	3,094.27
Marconi Wireless Telegraph Co., repairing wireless apparatus	21.14
Robins Dry Dock & Repair Co., for two lifeboats, with platforms, davits, and gear complete, repeating telegraph from bridge to engine room, steel water-closet, port and starboard sides	4,165.00
Boring out air chamber and furnishing and installing new hand valve and seat	1,375.00
Invoice of Sept. 30, 1919, for sundry repairs and renewals of cabin, saloon, galley, deck and deck equipment	25,408.39
Robins Dry Dock and Repair Company, invoice of Sept. 30, 1919, for sundry repairs and renewals	42,401.33

* * * * * * *

Subject to reservation by the plaintiff and intervener of assent to the correctness of any one or more of the several allocations as debits or credits against or in favor of the plaintiff or defendant of the amounts set out, it is agreed by the parties that the figures and specifications of items are correct as they appear in the statement of the Board.

CHARLES B. RUGG,
Assistant Attorney General.
ARTHUR COBB,
Attorney for the United States.

The plaintiff, Acme Operating Corporation, considering the facts above set forth to be proven, and deeming them material to the due presentation of this case in the special findings of fact, concurs in the request of the defendant that the facts be found as set out.

ACME OPERATING CORPORATION,
Plaintiff.
By JOHN WALSH, *Attorney.*
Of Counsel:
LOUIS B. EPPSTEIN.

The Intervener, Liberty Trust Company, considering the facts above set forth to be proven and deeming them material to the due presentation of this case in the special findings of fact, concurs in the request of the plaintiff and defendant that the facts be found as set out.

LIBERTY TRUST COMPANY,
Intervener.

By HOWE AND BRADLEY,
(formerly Howe, Hill and Bradley),
Attorneys.

Of Counsel:
PILLSBURY, DANA & YOUNG.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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CHARLES ELMORE
FILE COPY

No. 319

In the Supreme Court of the United States

OCTOBER TERM, 1932

UNITED STATES, PETITIONER

v.

ACME OPERATING CORPORATION; LIBERTY TRUST COMPANY, INTERVENOR

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE PETITIONER

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 319

THE UNITED STATES, PETITIONER

v.

ACME OPERATING CORPORATION, LIBERTY TRUST Company, intervenor

---

REPLY BRIEF FOR THE PETITIONER

The intervenor's brief contains a number of statements of fact which are not supported by the record. We desire to call attention in this brief to some of the more important of these errors.

On page 9, and again on pp. 13–14 of the intervenor's brief, reference is made to charter hire rates of vessels of the *Whitney* class, and a tabulation of these rates appears as Appendix A at p. 47 of the brief. These statements are based on Finding 25. (R. 44.) But the rates set out in the finding and copied by the intervenor are wholly inapplicable to the vessels here involved. The rates in the finding are expressly stated to be those prevailing in "nations which impose no limitation

with respect to shipping and charter rates," that is, neutral countries, and they are time charter rates, not bare-boat rates.

On page 11 of its brief the intervenor states that "On August 12, 1918, the Shipping Board succeeded, however, in getting the two owning companies to sign and Fidelity Trust Company, through ill advice or improvidently, to join in signing the agreement, a copy of which is annexed to the petition of the Fidelity Trust Company." There is no suggestion in the record of duress, misrepresentation, or other than the fairest and most open dealing in respect of the contract of August 2. Miller and Stafford, and the Acme and Whitney Corporations, had collected over $1,200,000 in freight money, and had expended all except a small part of this sum on account of purchase and enlargement of the vessels (R. 36); and the Trust Company was apprehensive lest the consignors of freight recover what was left of moneys on hand and force the sale of the vessels.[1]

The statement in paragraph (5) on p. 13 of the intervenor's brief must be read in connection with the provisions of the contract of August 12, 1918. By that contract, full compensation was payable, as between the Trust Company and the Government, to the owners. Since the mortgagees had not

[1] This Court had not then decided *Allanwilde Transport Co.* v. *Vacuum Oil Co.*, 248 U. S. 377, and *Texas Co.* v. *Hogarth Shipping Co.*, 256 U. S. 619.

reduced the vessels to possession at the time the requisition charters were executed, the owners were free to operate or let them on such terms and for such compensation as they deemed fit.

The intervenor, at pp. 14–15 of its brief, estimates the cargo carrying capacity of the vessels as being the total of their d. w. t. capacity, due to the necessity of space for fuel, stores, quarters, and so on. The total cargo carrying capacity would obviously have been very materially less than the figure stated.

The tabulation presented by the intervenor at pp. 16–17 of its brief shows a deficiency of about $1,200, the result of a deficiency in security on the *H. N. Whitney* of $128,000 and an excess margin of security in the case of the *J. S. Whitney* of $126,800. But this tabulation includes large sums charged as interest on the mortgages and on the liens. There is no finding relating to interest on the mortgages or showing that there was a default in interest on the part of the mortgagors. Nor is there any reference in the findings to interest after April 27, 1918, in relation to the Valk and Murdock lien on the *J. S. Whitney,* or of interest subsequent to August, 1918, on the Crane lien on the *H. M. Whitney.* Incidentally, there was advanced by the Trust Company on the $200,000 note in the case of the *H. M. Whitney* only $175,000, $25,000, or 12½%, being retained by the Trust Company as a bonus. (Finding 6. R. 31.)

On p. 19 of its brief the intervenor states that after the vessels were returned in July, 1919, "they could be operated only at a net loss." From finding 24, to which reference is made in support of this statement, it appears that the vessels were operated at a loss. But there is nothing in the record to indicate the wisdom or business efficiency of the operation of the vessels by the Trust Company, nor is there a suggestion that proper operation of the vessels would not have resulted in material profits.

The intervenor on p. 23 of its brief objects to the petitioner's argument that the Government was not liable to pay compensation for ordinary wear and tear. Ordinary wear and tear is a necessary incident to the proper use of any property. Here, however, it was expressly provided by the Ninth and Eleventh articles of the charter parties under which the Government operated the vessels, that the Government would not be liable for such wear and tear. The full text of this charter party is set out in Appendix A of this brief. The charter parties appear in full in the stipulation filed in the lower court, and quotations from them are set out in Finding 22. (R. 41.)

The intervenor states at pp. 28–29 of its brief that as a matter of common knowledge the market was rapidly falling when the vessels were released, due to the sudden flooding of the market by the return of requisitioned vessels. This statement is not supported by the record. As a matter of fact and "common knowledge," as evidenced by Fair Play

and other maritime publications, the market for vessels was rapidly rising and continued to rise until the end of the first quarter in 1920, when the all-time peak market value of vessels was reached.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
ERWIN N. GRISWOLD,
ARTHUR COBB,
Attorneys.

JANUARY, 1933.

APPENDIX A

UNITED STATES OF AMERICA

REQUISITION CHARTER

Name of steamship: H. M. Whitney.
Type of steamship: Steel Steamship.
D. W. tonnage: 3,800.
Gross tonnage: 2,707.
Passenger capacity: ——.
Knots per hour: 14½.
Date on which vessel entered into pay: April 27, 1918.

THIS REQUISITION CHARTER made and concluded upon in the District of Columbia as of the 27th day of April, 1918, between Whitney Steamship Corp. of New York, owner of the good American steel Screw Steamship *H. M. Whitney,* of New York, of 2,707 tons gross register and 1,791 tons net register, built in 1890, having engines of 379 nominal horsepower, provided with proper certificate for hull and machinery, and classed A1 Am. Bureau at about 200,000 cubic feet capacity and 3,800 tons dead-weight capacity, summer freeboard, inclusive of permanent bunkers, capable of making an average voyage speed when loaded of 14½ knots an hour, under ordinary conditions, on a consumption of about 45 tons of coal, or about ——— bar-

rels of oil per 24 hours; and the United States of America, through the United States Shipping Board—

WITNESSETH:

Whereas by Requisition Order, dated April 27th, 1918, pursuant to the Urgent Deficiency Act 15 June, 1917, and the President's Executive Order 11 July, 1917, the United States has requisitioned the use of the Steamship *H. M. Whitney,* and the steamship has been delivered into possession of the United States pursuant to the Requisition; and

Whereas it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for use of the steamship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the Requisition, and with respect to other matters in connection therewith:

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

FIRST. The terms and conditions under which the vessel is to be operated shall be those contained in the "Time Form" hereto annexed; provided, however, that at the time of the Requisition or at any time thereafter, on five days' written notice, the United States may operate the vessel under the terms and conditions contained in the "Bare Boat Form" hereto annexed, such operation to begin when the steamship is in a United States port.

SECOND. In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this Requisition Charter in full satisfaction of any and all claims he has or may have against the United

States arising out of the Requisition and accepts the compensation herein provided for as the just compensation required by law; provided, however, that the acceptance of this Requisition Charter shall be without prejudice to the claims, if any, the owner may have against the United States arising out of recoveries against the owner by third parties on the vessel's commitments.

THIRD. Upon giving five days' written notice to the owner the United States may at any time, when the vessel is in the United States port, cancel this Requisition Charter without prejudice to the accrued rights of either party.

Witness to the signature of—
(Sgd.) WHITNEY STEAM SHIP CORP.,
Owner.

By (Sgd.) R. E. MILLER, *Prest.*
(Sgd.) U. J. GENDRON.

Witness to the signature of—
THE UNITED STATES SHIPPING BOARD,
By (Sgd.) PAUL FOLEY,
Director of Operations.
(Sgd.) U. J. GENDRON.

* * * * *

BARE BOAT FORM

FIRST. The steamship shall remain in the service of the United States under the Requisition Order to be employed as and where the United States may from time to time determine and for such period of time as the United States may determine, but such period shall not extend beyond the first arrival of the steamship in an American port six months

after peace is declared, unless she shall be required for Government purposes. The Vessel, when placed at the disposal of the United States, as directed by it, shall be or shall forthwith be made at the expense of the owner tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, outfitted, and equipped, and in every respect seaworthy and in good running order and condition, and shall be fit for the service in which she has usually been employed, having on her delivery United States Inspection Certificate that the steamship has met all requirements to fit her for the trade in which she is employed at the time of the Requisition, except that no such certificate shall be required if she be a foreign-built vessel not at present subject to the United States Steamboat Inspection laws as provided in the Panama Canal Act, as amended 18 August, 1914. Any deficiency in these respects must be remedied forthwith at the expense of the owner; and any time lost in remedying such deficiency is not to be paid for by the United States.

SECOND. The United States, at its sole expense, shall man, operate, victual, and supply the vessel.

THIRD. The United States shall pay all port charges, pilotages, and all other costs and expenses incident to the use and operation of the vessel.

FOURTH. The United States shall assume war, marine, and all other risks of whatsoever nature or kind, including all risk of liability for damage occasioned to other vessels, persons, or property.

FIFTH. The United States shall pay for the use of the steamship at the monthly rate which shall from time to time be established by the United States Shipping Board for a vessel of her description, commencing on and from the hour when she

shall be ready for delivery under the Requisition (and is so reported to the United States) and at and after the same rate for any part of a month, hire to continue until the hour at which the vessel may be ready for redelivery at a United States port (and is so reported to the owner).

If the United States Shipping Board shall hereafter lower the rate of hire from that in effect on 15 October, 1917, the owner shall have the option of canceling this Requisition Charter as of the date of such reduction, without prejudice to the rights of either party.

Payment of the hire shall be made in the District of Columbia, in cash, monthly, as earned, at the end of each calendar month. If the vessel is lost, hire shall be paid up to and including the date of her loss (if the time of her loss be uncertain, then up to and including the date she is last heard from).

Dead-weight tonnage shall be based on summer freeboard assigned or to be assigned with reference to North Atlantic service, according to the standards of any recognized classification society; proper evidence of such assignment, together with a true copy of the dead-weight scale of the vessel, shall, if possible, be furnished by the owner. Until reasonable opportunity has been afforded the owner to procure such assignment, hire shall be paid on dead-weight tonnage as certified by the owner, any excess or deficiency in such hire to be adjusted upon subsequent determination of summer freeboard.

SIXTH. A certified statement from a recognized classification society that the vessel has been classed as fit for her usual previous service shall, if obtainable at a reasonable cost, be furnished by the owner.

Any alterations which are made to obtain a class for North Atlantic service which are not required to obtain a class for the vessel's previous usual service shall be made by and at the expense of the United States, but there shall be no deduction from the hire for time consumed in making such alterations. So far as the exigencies of the service will permit, the United States shall do all things necessary to maintain the vessel's class.

SEVENTH. The United States shall accept and pay for all fuel and consumable stores in good order and condition on board at the time of vessel's delivery under the Requisition Order, and the owner shall, on redelivery, pay for all such supplies left on board, at the current market price at the respective ports of delivery and redelivery. An inventory of all such supplies shall be furnished forthwith by the owner to the United States for verification.

EIGHTH. The United States shall have the use of all outfit, equipment, and appliances without extra cost, provided same or their substantial equivalent shall be returned to the owner when the vessel is redelivered in the same or as good order and condition as when received, ordinary wear and tear excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

NINTH. In case of actual or constructive loss as provided in clause "Tenth" due to the operation of a risk assumed by the United States, just compensation for such loss, with interest at 6 per centum per annum, commencing 30 days after the date of such loss, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the

purpose of establishing the amount of the just compensation. The United States shall, however, have the option (to be exercised within 90 days after the date of such actual or constructive loss) of delivering to the owner within a year after such loss, in lieu of such payment, a vessel of substantially similar tonnage, type, class, and value, and of substantially no greater age (any deficiency in value to be paid for in cash), paying interest in the meanwhile from the date of loss at the rate of 6 per centum per annum on the value of the lost vessel.

In case of damage (not constituting an actual or constructive loss) due to the operation of a risk assumed by the United States, the vessel shall, at the cost to the United States, be restored to the owner at the expiration of her service under the Requisition, in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear excepted, or, just compensation for the damage, with interest at 6 per centum per annum, commencing 30 days after proof of such damage upon redelivery of the vessel, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

TENTH. If the steamship sustains serious damage or other injury to the extent that the United States shall, without regard to any rule of law, consider her a total loss, the United States shall have the option (to be exercised within 90 days thereafter) of declaring the steamship to be a total loss as of the date of the damage, and of taking over or selling her, and the owner's rights as to compensation shall be the same as provided in clause

"Ninth," interest to commence 30 days after the date of the damage.

ELEVENTH. The United States may at any time remove or alter, at its expense, all or any of the fittings of the vessel, and may erect any new fittings which may be required to render the vessel available for service to the United States, provided that the vessel shall, at the cost of the United States, be restored to the owner at the expiration of her service under the Requisition in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear excepted, or just compensation for the damage thus occasioned to the vessel, with interest at 6 per centum per annum, commencing 30 days after the proof of such damage upon redelivery of the vessel, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation.

TWELFTH. The United States shall have a lien on the vessel for all moneys paid and not earned or due to the owner and for all advances and overpayments made, and the United States shall have a lien on all cargoes and goods for the payment of freights and charges, including dead freight, demurrage, forwarding charges, charges for carriage to port of shipment, and for general average claims.

THIRTEENTH. Any dispute of law or fact arising under this "Bare Boat Form," except as to the rate of hire and the compensation for actual or constructive total loss of the vessel and except as to matters expressly left to be decided by the United States Shipping Board, shall be referred to the ar-

bitration of three persons, one appointed by the owner, one by the United States, and third by the two so chosen. They may proceed in any manner determined by themselves, and their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award hereunder the agreement may be made a rule of court. Such arbitration shall be a condition precedent to the commencement of any action.

FOURTEENTH. No Member of or Delegate to Congress or Resident Commissioner, nor any person employed by the United States Shipping Board, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, but under the provisions of section 116 of the act of Congress approved 4 March, 1919, this stipulation, so far as it relates to Members of or Delegates to Congress or Resident Commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

SPECIAL CLAUSE—PASSENGER SHIP

FIFTEENTH. The owner of a passenger vessel shall permit the use, without extra cost therefor, of all cooking utensils and facilities already aboard the vessel, provided the same or their substantial equivalent be returned to the owner when the vessel is redelivered in as good order and condition as when received, ordinary wear and tear excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

SPECIAL CLAUSES—TANKERS

SIXTEENTH. The owner guarantees that the tanks are oil tight at the time of delivery.

SEVENTEENTH. To facilities the discharge of oil fuel, the owner shall provide a Y-piece with necessary reducers for each discharge up to the maximum number which can be used simultaneously.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 319.

THE UNITED STATES, *Petitioner*,

vs.

ACME OPERATING CORPORATION and LIBERTY TRUST COMPANY, *Intervenor*.

RESPONDENT'S BRIEF.

Walter B. Howe,
HOWE & BRADLEY,
1819 H St., N. W.,
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Attorneys for Intervenor.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Page

Statement 1

I. No Question of General Importance Sufficient to Invoke the Discretionary Power of this Court to Grant a Writ of Certiorari is Presented by Petition 2

II. The Claim Being for Compensation Payable Under the Terms of the Act of Congress, There Can Be No Question of the Jurisdiction of the Court of Claims 4

III. The Petitioner Has Failed to Show that the Decision is in Conflict With the Weight of Authority 6

IV. The Complaint as to the Form of Pleading Comes Too Late 9

V. The Record Does Not Substantiate the Contention that the Findings Do Not Support the Judgment 10

CASES CITED.

A. W. Duckett & Co., Inc. v. United States, 266 U. S. 149 ..... 5, 7

Chicago v. Tebbetts, 104 U. S. 120 7

Delano v. Smith, 206 Mass. 365 ..... 3, 8, 9

Huse v. United States, 222 U. S. 496 ..... 7, 10

Morgan v. Gilbert, 2 Fed. 835 3

United States v. Wells, 283 U. S. 102 11

Wisconsin Central R. R. vs. United States, 164 U. S. 190 ..... 7, 10

TEXT BOOK

Jones on Mortgages, 8th Edition, Sections 843, 851, 858 and 859 ..... 3, 6

STATUTES

Massachusetts General Laws, Ch. 79, Sections 33 and 34 6

Public Act, No. 23, 65th Congress, House Resolution 3971 (U. S. Statutes at Large, Vol. 40, Part 1, Ch. 29, Page 182) 4

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OCTOBER TERM, 1932.

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THE UNITED STATES, *Petitioner,*

vs.

ACME OPERATING CORPORATION and LIBERTY TRUST COMPANY, *Intervenor.*

RESPONDENT'S BRIEF.

STATEMENT.

This is an application by the Government for a writ of certiorari to review the judgment of the Court of Claims in the case of Acme Operating Corporation v. United States, No. E-260.

This case arises out of the taking by the United States, acting through the United States Shipping Board Emergency Fleet Corporation, and under Act of June 15, 1917, of two ships known as the H. M. Whitney and the James S. Whitney on which the Intervenor's predecessor held mortgages. The mortgages being Massachusetts mortgages, the

legal title to these ships was in the Intervenor's predecessor as mortgagee (Record p. 62) although subject to certain liens for money owed to certain shipyards. The equity of redemption was in the Acme Corporation or corporations affiliated with it.

The ships when taken were "in all respects staunch, strong, seaworthy and in good repair." (Finding 32, Record p. 49.) They were subsequently released from requisition in such unseaworthy condition that it required the expenditure of $129,299.76 and two or three months' time to put them back in the condition in which they had been at the time of the requisition. (Finding 24, Record pp. 43, 44.)

It was conceded by the Government before the Court of Claims that the just compensation to be paid for the requisition included compensation for the damage to the condition of the vessels. (Record p. 64.) The only questions on this phase of the case were the amount of damage and whether such amount was owed to the mortgagee or to the holder of the equity against which the Government had a set-off. The Court gave judgment for the mortgagee and the Government brought the present petition.

I.

No Question of General Importance Sufficient to Invoke the Discretionary Power of this Court to Grant a Writ of Certiorari is Presented by Petition.

It is submitted that the question of whether in a given case compensation for a taking should, on the facts of the case, be paid to the mortgagee or to the holder of the equity of redemption does not present such "special and important reasons" for the exercise of the Court's discretion as to bring the case within any one of the classes indicated in revised rule 38 of this Court.

Counsel for the petitioner, as a reason for granting the writ, says: "In its determination of the 'new principle for which it found no direct precedents in the authorities' the

Court so far departed from the usual and accepted course of judicial procedure as to require the exercise by this Court of its supervisory powers of review." (Record p. 5.) An examination of the opinion of the Court of Claims will show that it had for consideration two claims of the Intervenor. The main contention of the Intervenor was that it had been prevented from foreclosing its mortgages by the requisition, that the value of tonnage had so diminished that the value of these vessels was less than the shipyard's liens which were prior to the lien of the mortgages and that therefore the Intervenor was entitled to recover an amount equal to the mortgage debt. The second claim related to the damaged condition of the vessels when released from requisition. The language of the Court of Claims quoted in the petition relates to the first claim, which the Court denied, and not to the second claim, which they allowed. The Intervenor's claim for the depreciation in value of the ships on account of a lower market price of tonnage at the time of the release from requisition is discussed on pages 62 to 64. The matter of the damaged condition of the vessels is discussed separately, beginning at the bottom of page 64 of the record. It is submitted that even if the principle involved in the first claim was a new one, it having been decided adversely to the Intervenor the petitioner has no ground of complaint. The second claim, namely, for the cost of repairing and reconditioning the vessels, was, of course, in no sense novel but on the contrary has been established by a long line of decisions. *Delano v. Smith,* 206 Mass. 365, *Morgan v. Gilbert,* 2 Fed. 835. See also Jones on Mortgages 8th Edition, sections 843, 851, 858 and 859 and cases therein cited.

II.

The Claim Being for Compensation Payable Under the Terms of the Act of Congress, There Can Be No Question of the Jurisdiction of the Court of Claims.

Public Act No. 23, of the 65th Congress, House Resolution 3971, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved June 15th, 1917 (U. S. Statutes at Large, Vol. 40, Part 1, Ch. 29, Page 182), provides that:

> "The President is hereby authorized and empowered, within the limits of the amounts herein authorized: (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship."

The act further provides (Page 183):

> "Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

The act also provides (Page 183):

> "The word 'person' shall include any individual, trustee, firm, association, company, corporation or contractor."

> "The word 'ship' shall include any boat, vessel or submarine and the parts thereof."

It is the contention of counsel for the Government in the instant case that a mortgagee of requisitioned ships, who was not entitled to immediate possession of the ships at the time of the taking, is not included within the class of persons entitled to compensation under the statute and therefore his claim is a tort claim and accordingly outside the jurisdiction of the Court.

The claim of the mortgagee is not for interference with its possession of the mortgaged property, but for actual physical injury to property to which it held the legal title.

It is submitted that the situation in the present case is analogous to that in the case of *A. W. Duckett & Company, Inc. v. The United States,* 266 U. S. 149. In that case, the President under the Act of August 29, 1916, had taken possession of a portion of the Bush terminal docks and warehouse property in Brooklyn. The claimant was a lessee of a portion of the premises taken. This Court, speaking by Mr. Justice Holmes, at pages 151, 152, said:

> "We see no ground for attributing to The United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant. The order made no such distinction, but promised fair compensation, seemingly to all, and the subsequent appointments of a board of appraisers contemplated payment to tenants. * * * Whatever the effect of the taking there was a contract implied in fact by the President's order, and there is no doubt concerning the jurisdiction of the Court of Claims."

Since the question here was also a question of whether the United States owed to the Intervenor compensation for the taking of the requisitioned vessels, there can be no doubt on the jurisdictional point.

III.

The Petitioner Has Failed to Show that the Decision is in Conflict With the Weight of Authority.

(a) The first ground on which the petitioner alleges that the decision is in conflict with the weight of authority is that a mortgagee not entitled to possession can not maintain an action against a third person for injury unless the injury was *wrongful*. It is submitted that this contention is unsound for the same reason as the petitioner's argument on the jurisdictional point. Since the award was for compensation under an implied contract, it follows that there was no occasion to show that the damage was wrongfully inflicted. In such a case it is no more necessary to show wrongful action than in any case of eminent domain. The Government assumed to itself by paramount authority and power the possession and control of the vessels, agreeing to pay injured parties just compensation. The injury to the Intervenor was wholly independent of the question of what caused the damage to the vessels. Its claim is based on the fact that its property rights therein were damaged, because the vessels were seaworthy when taken and unseaworthy when returned.

Ordinarily, damages for a taking by eminent domain are regulated by detailed statutes which uniformly recognize and protect the interest of a mortgagee. See, for example, Massachusetts General Laws, c. 79, sec. 33 and 34. Nor do the cases and the text book cited by the petitioner support the proposition for which they are adduced. The cases involved wrongfully inflicted injury and the Courts permitted recovery, but it does not follow from that that a wrong is in all cases essential to the mortgagee's claim. The reference

to Jones on Mortgages is to sections relating to trespasses of one sort or another. The rule as to takings is discussed in a different section of the work. (Section 843.) See also, *Chicago v. Tebbetts,* 104 U. S. 120.

So far as the Government's contention under this section of its argument is based on the fact that it had reached some settlement with the owners for the damage to the vessels, the point would seem disposed of by the language of Mr. Justice Holmes in *A. W. Duckett & Co. Inc. v. U. S.,* 266 U. S. 149, *supra,* where he says (page 151):

> "Any arrangement that the Government may have made with the owner to pay to it what might be due to the tenants did not affect the claimant's rights."

This settlement with the owners is, of course, in the nature of an admission by the Government of liability for repairs, and it is submitted that the remaining question of the exact amount of such repairs and the causes necessitating them on the evidence presents no proper question for certiorari. Furthermore, no claim that the Government was not chargeable with such repairs as were necessary was raised in the Court below as appears from the opinion (Record p. 64), where the Court says:

> "We think it clear that the defendant was liable to some one for any damage done to the vessels themselves. We do not understand counsel for defendant to dispute this general statement."

It is submitted that the claim now comes too late. *Wisconsin Central R. R. v. U. S.,* 164 U. S. 190, *Huse v. U. S.,* 222 U. S. 496.

(b) The second ground on which the petitioner alleges that the decision is in conflict with the weight of authority is that the mortgagee's security was not impaired and that the absence of this feature is fatal to the allowance of compensation.

We submit that the record does not support the contention of the petitioner. The petitioner argues that because the vessels would have been worth $918,000 if in good condition, they were worth that amount less the cost of repairs, or $38,000 more than the face of mortgages and liens having priority thereto. (Record p. 7.) The omission of over $38,000 interest which had accrued on the mortgages and shipyard liens during the period of the requisition, is not explained. But, apart from this it by no means follows that the vessels while out of repair could have been sold at any price or that they could have been sold at the same price three months later when the repairs were completed.

It is therefore submitted that the issue attempted to be raised by the petitioner's third assignment of error is not really in the case. But even if it were, the petitioner does not show that the decision is against the weight of authority. The cases referred to in the petition, while not directly on the point for which they are cited, at least contain *dicta* which bear on it and are *contra* to the contentions of the petitioner. The statement of the law in the text-book cited is in accord with the decision of the Court of Claims. The mortgages were Massachusetts mortgages, executed and delivered in the Commonwealth (Findings 2, 6; Record pp. 30, 31, 62), and title was in the mortgagee. The mortgagee was entitled to recover for injury to the property, although the security remained ample for its protection. It had a right to its security undiminished. *Delano vs. Smith,* 206 Mass. 365.

It is submitted that the Court of Claims did not, as asserted by the petitioner, expressly hold that the Massachusetts rule was not applicable to this phase of the case. What that Court held was that the rule did not control as to the claim for depreciation in value of tonnage during the time the ships were held by the Government. The petitioner states that the Massachusetts rule is based on the fact that

in Massachusetts a mortgagee has a present right to possession. This is, of course, a misconception of the rule. As was said by the Supreme Judicial Court of Massachusetts in the case of *Delano v. Smith*, 206 Mass. 365 (*supra*), at page 369:

> "Whether the mortgagee is in possession of the mortgaged premises, or not, or whether his right to possession begins only with the breach of condition, and there has been no breach, nevertheless he has such an interest in the property and its preservation as enables him to maintain an action in his own name for injury to it. Such right of acton is founded not upon the right to present possession, but upon title to the estate."

The decision of the Court of Claims was not that under the Massachusetts rule the mortgagee was not entitled to recover for damages to the mortgaged property, but was that one who is not entitled to possession at any time during the holding of the mortgaged property by a third person can not recover for diminution in market prices during that period except so far as it is due to actual damage to the property.

It is submitted that the petitioner has failed to show that the decision is in conflict with the weight of authority on either of the grounds assigned in the second and third assignments of error.

IV.

The Complaint as to the Form of Pleading Comes Too Late.

With regard to the claim of surprise alleged in the last paragraph of the petition, we beg leave to call the attention of the Court to what the Court below said on this matter (Record p. 65):

> " * * * it should be observed in this connection that this matter is specifically argued both by the Inter-

> venor and counsel for defendant without any objection being made on account of the indefinite nature of the pleadings or motion for a more specific statement."

It is submitted that this contention falls within the rule laid down in *Wisconsin Central Railroad v. The United States,* 164 U. S. 190, at 212, and repeatedly followed, where the Court said:

> "The record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the Court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demanded."

See also *Huse v. The United States,* 222 U. S. 496.

V.

The Record Does Not Substantiate the Contention that the Findings Do Not Support the Judgment.

The second contention contained in said last paragraph of the petition is based on the claim that the Court did not find that the expenditures, the amount of which were awarded as compensation, were necessary to restore the vessels to their condition when requisitioned. It is submitted that this is not a fair interpretation of Finding 24, for it is evident that the Court considered that its findings of fact amounted to that in substance, in view of its conclusion of law based on the findings that the Intervenor was entitled to recover the said sum with interest, and in view of the reasoning of the Court in its opinion. The Court of Claims (pp. 65-66) says:

> "There is no direct evidence that the amount which the Intervenor seeks to recover was actually necessary to put the vessels in as good repair and condition as

> they were when the Government took them over, but no question is raised but what the vessels were in good condition when the Government took them * * * we think it would be unreasonable to suppose or believe, when the liens of the construction companies and of the Trust Company so nearly approached the whole value of the vessels, that the Trust Company would expend additional sums on them if it was not reasonably necessary to put them in proper condition * * * The various items which made up these two expenditures all appear to be necessary expenses in reconditioning the ships except $7,165 expended for lifeboats."

From this language it is evident that the issue of fact on which the Court made its finding related to the amount "actually necessary to put the vessels in as good repair and condition as they were in when the Government took them over." On this question of the amount so made actually necessary the Court found that nearly all the items of expenditure were for direct repairs and then expressly indicates certain items which it found that the evidence did not show to be in the nature of repairs or reconditioning and awarded judgment for the amount expended less the specific items not proved. The form of the finding and the fact of the judgment make it clear that Finding 24 was intended by the Court to be a finding that the evidence showed that all the items not excluded were in the nature of repairs or reconditioning actually necessary. It is submitted that this interpretation of the findings is supported by the principle applied by this Court in *U. S. v. Wells*, 283 U. S. 102 at 111.

Respectfully submitted,

HOWE & BRADLEY,
Attorneys for Intervenor.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 319.

THE UNITED STATES, *Petitioner*

v.

ACME OPERATING CORPORATION, LIBERTY TRUST COMPANY, *Intervenor.*

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE INTERVENOR.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Page

OPINION BELOW 1

STATEMENT OF CLAIM OF INTERVENOR... 2

ARGUMENT:

I. BASIS IN FACT AND LAW OF CLAIM OF INTERVENOR.

A. The Mortgages involved and the Nature and extent of the Mortgagee's Interest.. 4

B. Lien Interests in the Vessels..... 6

C. The Status of the Vessels when Requisitioned 7

D. The Status of the Mortgages before the Vessels were Requisitioned and the Effect of the Requisition on the Mortgages and the Mortgagee's Rights and Security 8

E. The Impairment of the Mortgage and Lien Security resulting from the Requisition 15

F. The Basis in law for the Contention of Right to Compensation for Impairment of Security Value 17

II. THE JUDGMENT OF THE COURT OF CLAIMS IS SUPPORTED BOTH BY FINDINGS OF DAMAGE DURING REQUISITION AND OF INJURY TO INTERVENOR.

A. The Record contains Findings necessary to Establish Liability 21

Page

B. The Intervenor had a Sufficient Interest in the Vessels to entitle it to Compensation.. 25

C. The Effect of the Inadequacy of Security 28

D. The Mortgagee, as against all Parties but the Maritime Lienors, is to be considered as Mortgagee in Possession 30

E. Compensation due the Mortgagee is not a subject of set off under the Agreement of August 12, 1918 32

III. THE COURT OF CLAIMS HAD JURISDICTION OF THE CASE.

A. The Intervenor's Claim is for Just Compensation under the Act of June 15, 1917 34

B. The Claim being for Compensation Payable Under an Act of Congress Conferring Jurisdiction on the Court of Claims is not a Tort Claim 35

C. The Government's Contention with regard to Matters not raised in the Petition for Certiorari 36

D. The Case of Matson Navigation Co. v. United States is not applicable..... 40

IV. THE PLEADINGS ARE SUFFICIENT... 41

V. THE INTERVENOR'S POSITION AS SUCCESSOR TO THE RIGHTS OF THE MARITIME LIENORS..... 43

CONCLUSION 46

CITATIONS.

Cases:	Page
Alice State Bank v. Houston Pasture Co., 247 U. S. 240, 242	25, 36
Byrom v. Chapin, 113 Mass. 308	26
Chicago v. Tebbetts, 104 U. S. 120	26
Clark v. United States, 95 U. S. 539, 543	42, 44
Commercial Credit Co. v. United States, 276 U. S. 226, 228	25, 36
The Conveyor, 147 Fed. 586	9
Delano v. Smith, 206 Mass. 365	5, 26
Dooley v. United States, 182 U. S. 222	35
A. W. Duckett & Co., Inc. v. United States, 266 U. S. 149	17 34
Foster v. Perkins, 42 Me. 168	26
George Adams & Frederick Co. v. So. Omaha Nat'l Bk., 123 Fed. 641	31
Gooding v. Shea, 102 Mass. 360	26
Hays v. The Pacific Mail Steamship Co., 17 How. 596	5
Holmes v. Sprowl, 31 Me. 72	26
Huse v. The United States, 222 U. S. 496	43
Hutchins v. King, 1 Wall. 53	6, 27
James v. Worcester, 141 Mass. 361	26
Langnes v. Green, 282 U. S. 531	20
Luckenbach S. S. Co. v. The United States, 272 U. S. 533, 539	27
Matson Navigation Co. v. The United States, 284 U. S. 352	40
Morgan v. Gilbert, 2 Fed. 835	26
Parker v. New England Oil Corp., 8 F. (2) 392	19
Rogers v. The United States, 270 U. S. 154	24

	Page
The J. E. Rumbell, 148 U. S. 1	9
The Ruth E. Merrill, 286 Fed. 355 (C. C. A. 2nd circ.)	7
The Rupert City, 213 Fed. 263	9
Seaboard Air Line Ry. v. United States 261 U. S. 299	13, 18, 36
Searle v. Sawyer, 127 Mass. 491	26
Smith v. United States, 67 Court of Claims, 182	38
Steele, Executor v. Drummond, 275 U. S. 199	25, 36
Stewart v. Finkelstone, 206 Mass. 28	26
Stone v. The United States, 164 U. S. 380	21
~~U. S. v. Bostwick, 94 U. S. 53~~	~~6~~
U. S. v. Lippett, 100 U. S. 663	38
U. S. v. New River Collieries Co., 276 Fed. 690	13, 18
U. S. v. New River Collieries Co., 262 U. S. 341	13, 18
U. S. v. New York, 160 U. S. 598	38
The United States v. Wells, 283 U. S. 102	21, 24
Webster Electric Co. v. Splitdorf Electrical Co., 264 U. S. 463	25, 36
Wilmarth v. Bancroft, 10 Allen 348	26
Wisconsin Central R. R. Co. v. The United States, 164 U. S. 190	43

STATUTES:

R. S. 726 (40 Stat. 1181)	20
Act of June 15, 1917 (40 Stat. 182)	2

MISCELLANEOUS:

President's Special Message, Congressional Record, Vol. 63, p. 19	19

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ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE INTERVENOR.

OPINION BELOW.

The opinion of the Court of Claims is reported in 74 C. Cls. 82, and its judgment in favor of the intervenor comes before this Court pursuant to an order for certiorari filed October 17, 1932.

STATEMENT OF CLAIM OF LIBERTY TRUST COMPANY, INTERVENOR.

The claim of the intervenor, Liberty Trust Company, is to recover, as the successor of Fidelity Trust Company, with relation to its interests as the holder of mortgages and lien claims on the steamships J. S. Whitney and H. M. Whitney, just compensation, under the provisions of the Act of Congress of June 15, 1917 (U. S. Statutes at Large Vol. 40, Part 1, c. 29, pages 182 and 183) for the requisition of the vessels by the United States of the J. S. Whitney on April 27, 1918 (R. 37 and 38, Finding 18) and of the H. M. Whitney on April 29, 1918 (Rec. 38, Finding 19) and the retention of the vessels under such requisitions until July 10, 1919, as to the J. S. Whitney and July 8, 1919, as to the H. M. Whitney (R. 46, Finding 27).

The provisions of the statute material to the claim are as follows:

> "The President is hereby authorized and empowered, within the limits of the amounts herein authorized: (e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship." (p. 182)
>
> "Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to

sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph twenty, and section one hundred and forty-five of the Judicial Code."

"The word 'person' shall include any individual, trustee, firm, association, company, corporation or contractor." (p. 183)

"The word 'ship' shall include any boat, vessel or submarine and the parts thereof." (p. 183)

The Liberty Trust Company's claim came before the Court of Claims as follows:

On April 29, 1925, the Acme Operating Corporation filed a petition in the Court of Claims against the United States, by which it claimed that it was, by virtue of its interest in the vessels as a charterer thereof under charters executed before the requisitions, entitled under the Act of June 15, 1917, to the just compensation to be paid because of the requisitions (R. 8 to 15). The Liberty Trust Company (as the successor in interest of the Fidelity Trust Company) thereupon on February 4, 1927 (R. 16) filed its petition to intervene and claim on its own behalf, as a party in interest, compensation due from the United States because of the requisitions and was admitted to so intervene (Petition as amended R. 16 to 29).

The Court of Claims disallowed the claim of the Acme Operating Corporation on the ground that its alleged charters were fictitious but allowed the claim of the Liberty Trust Company to the extent of $129,299.76 for which judgment was entered (R. 60).

The United States petitioned this Court for a writ of certiorari based on an assignment of certain alleged errors of the Court of Claims (R. 5). This petition was allowed and the case is now before this Court under the writ.

ARGUMENT.

I.

THE BASIS IN FACT AND IN LAW OF THE CLAIM OF LIBERTY TRUST COMPANY.

(A) *The Mortgages Involved and the Nature and Extent of Mortgagee's Interest.*

As stated in the intervening petition (R. 16) Allan S. Farwell of Ashland, Massachusetts, took title in the two vessels in the fall of 1917 by purchase from the Eastern Steamship Company, the purchase being consummated with funds loaned in part by the Fidelity Trust Company of Boston, Massachusetts (R. 30 and 31, Findings 2 and 6). The title of the J. S. Whitney was taken by Farwell on October 30, 1917, and a mortgage concurrently given by him to Fidelity Trust Company and recorded at the office of the Collector of Customs at Boston securing the mortgage note of $150,000 given to the Trust Company for its advances; on the same date Benjamin L. Stafford and Robert E. Miller, co-partners, purchased the vessel from Farwell, subject to the mortgage given by him to Fidelity Trust Company; Miller and Stafford in turn executed a bill of sale to the Equitable Trust Company, subject to the mortgage given by Farwell to the Fidelity Trust Company, as security for the advances made by the Equitable Trust Company. On December 4, 1917, a similar course was followed as to the H. M. Whitney except that the loan of the Fidelity Trust Company, and mortgage given by Farwell securing it, was for $200,000 (R. pp. 16 and 17 III and IV; R. 30, Finding 2, and R. 31, Finding 6). Later, on January 3, 1918, the J. S. Whitney was conveyed, subject to the mortgages, to Acme Steamship Company and the H. M. Whitney on January 4, 1918, similarly conveyed to Whitney Steamship Company (R. 33 and 34, Findings 13 A and B) being

New York corporations formed by Stafford and Miller (R. 32, Finding 12).

The home port of each of the vessels, on the consummation of the conveyance to Farwell, was Boston, and the situs of the vessel was according to its home port.

Hays v. The Pacific Mail Steamship Company, 17 How. 596.

The mortgages so given by Farwell to Fidelity Trust Company, both residents of Massachusetts, executed (R. 62) in Massachusetts and forthwith recorded with the Collector of Customs in Boston, were Massachusetts mortgages, the effect of which was governed by the law of Massachusetts.

Until the passage of the Ship Mortgage Act in 1920 Congress had not seen fit to legislate in any manner as to vessel mortgages or rights under them except to prescribe as to the recording of them (R. S. Sec. 4192). Subject to the law as laid down by statute and by the courts of admiralty as to the attaching and precedence of liens of other kinds and as to the mortgagor being the "owner" under the statutory provisions relating to the enrollment, registration and operation of vessels of the United States, the status of title as between the mortgagor and mortgagee was left as determined by the applicable state law.

The mortgages given to Fidelity Trust Company were Massachusetts mortgages and the effect of the mortgages was as determined by the law of that state. Under the law of Massachusetts the mortgagee has such a title in the property as enables him to have recovery in his own behalf for any dealing with the property which affects adversely his interest,

Delano v. Smith, 206 Mass. 365,

where the court says, pp. 369 and 370,

> "Whether the mortgagee is in possession of the mortgaged premises or not, or whether his right to possession begins only with the breach of condition and there has been no breach, nevertheless he has such an interest in the property and its preservation as enables him to maintain an action in his own name for injury to it. Such right of action is founded not upon the right to present possession, but on title to the estate. He may maintain such an action, although he is a junior mortgagee and although the security remains ample for his protection. He has a right to his security unimpaired."

See also, Hutchings v. King, 1 Wall 53 [illegible], and other cases cited in *Delano v. Smith, supra.*

(B) *Lien Interests in the Vessels.*

In addition to its mortgage rights there had become vested in Fidelity Trust Company, and through it in Liberty Trust Company as its successor, the lien interests of Valk & Murdock Co. in the J. S. Whitney to the amount of $132,509.45 and interest, which that Company had on the date of requisition for work previously done and materials furnished by that Company in the reconditioning and enlargement of that vessel (R. 37 and 38; Finding 18) and to the major portion of lien interests of Theodore Crane's Sons Company in the H. M. Whitney, to the amount of $253,640.33 and interest, for work and material similarly done and furnished by that Company (R. 37 and 38, Findings 18 and 19).

These lien interests were on August 5, 1919, purchased by and assigned to Fidelity Trust Company in full by Valk & Murdock Company and by the Crane Company to the extent of $206,526.10 (R. 47, Finding 29) and in turn by it to Liberty Trust Company on April 7, 1921 (R. 47 and 48, Finding 29).

By these assignments the Fidelity Trust Company, and through it the Liberty Trust Company, succeeded to the lien rights of the lienors in the vessels.

The Ruth E. Merrill, 286 Fed. 355 (C. C. A. 2nd. Cir.).

(C) *The Status of the Vessels When the Steamships Were Requisitioned.*

The two vessels were requisitioned in April, 1918, at the request of General Pershing for the particularly severe service for vessels of this type, of towing barges across the Atlantic (R. 37, Finding 16). Both of the vessels had, before they were requisitioned, been undergoing extensive reconditioning and enlargement which, as to the H. M. Whitney, had been wholly completed (R. 31 and 32, Finding 9) at a cost of $369,739.90 by Theodore A. Crane's Sons Company (R. 31 and 32, Finding 9), and as to the J. S. Whitney substantially completed, at a cost of $243,664.48, by Valk & Murdock Company (R. 31, Finding 8). This work had put both vessels in complete repair and condition.

On the work done on the H. M. Whitney a balance of $253,640.63 remained unpaid and on the J. S. Whitney a balance of $132,509.45 (R. 31 and 32, Findings 8 and 9).

Before the H. M. Whitney was taken on requisition on April 29, 1918 (R. 38, Finding 19) a libel had been filed by the Crane Company in the District Court for the Eastern District of New York and she had been arrested and was in the hands of the United States marshal. She was by order of the court on April 29 turned over to the United States Shipping Board "to be utilized for military purposes" (R. 37, Finding 16), with the master of the vessel and each successive master to be appointed by the marshal as his special deputy marshal in custody of the vessel and with the vessel to be returned to

the marshal on release from requisition (R. 38, Finding 19).

Shortly after the J. S. Whitney was requisitioned on April 27, 1918, she was arrested by the United States marshal pursuant to a libel in rem filed against her in the District Court for the Eastern District of South Carolina by Valk & Murdock Company for the $132,509.45 balance of its claim against her for labor and material furnished incident to her reconditioning and enlargement. On May 27, 1918, she was by order of the court delivered over to the Shipping Board pursuant to the requisition, subject to an order entered May 18 that, in order to protect the rights of parties having prior liens on the vessel and who had come into court to have them adjudicated, the amount to be paid for the use of the vessel would be treated as and in lieu of the vessel itself, and that the libellants were entitled in priority to the owners to any sum or sums to be paid on account of the requisition of the vessel (R. 38, Finding 18).

As the learned counsel for the United States has appeared to attach considerable importance to the point whether the owner of the vessels or the mortgagee was in possession when the vessels were turned over to the Shipping Board under the requisitions, it is to be noted that they were in the possession of neither of them but were in the possession of the United States marshals in these proceedings.

(D) *The Status of the Mortgages Held by the Fidelity Trust Before the Vessels Were Taken Over Under the Requisitions and the Effect of the Requisitions on the Mortgages and Mortgagee's Rights and Security.*

At the time of the requisitions the mortgages on both of the vessels were very nearly matured, the maturity date on the J. S. Whitney mortgage being April 30, 1918

(R. 37, 60) and of the H. M. Whitney mortgage being June 4, 1918 (R. 37, 61). On the J. S. Whitney mortgage there was a large margin of security value in the vessel above the lien claim of $132,509.45 and the mortgage of $150,000, the fair market value of the vessel being $544,000 (R. 49, Finding 32). On the H. M. Whitney there was a fair margin of such security, the lien claims being $253,640.33, and the fair market value of the vessel $500,000 (R. 49, Finding 32), leaving a margin of $46,-359.67 above the mortgage of $200,000. Except for the intervention of the requisitions the Trust Company could on the maturity of each mortgage have purchased the lien claims and then taken possession and foreclosed under its mortgage, bidding the vessel up to a point necessary to give it full satisfaction of the mortgage indebtedness, or permitted the vessel to be sold under the lien proceedings, bidding it up to an amount sufficient to satisfy the liens and its mortgage out of the proceeds and by petition in the lien proceedings getting its mortgage paid out of the proceeds of the sale above the amount required to satisfy the maritime lien.

The Rupert City, 213 Fed. 263 at p. 266
The Conveyor, 147 Fed. 586 at p. 589
The J. E. Rumbell, 148 U. S. 1 at p. 15.

Its very power to do this would have enabled it, without the exercise of the power, to bring either the mortgagor or the junior mortgagee, the Equitable Trust Company, to the point of dealing with the lien claims in such a manner as to eliminate them as liens having priority to its mortgage, for the demand for vessels was such that charter hire rates for this class of vessel stood at 41 s. 4 d. per d. w. ton per month for vessels of this class (R. 44, Finding 25) figuring in dollars $9.82, amounting at that rate to $364,125 a year on the J. S. Whitney of 3090

d. w. t. capacity and $380,623 on the H. M. Whitney of 3230 d. w. t. capacity (R. 32, Finding 10).

The taking of the vessels by requisition took away from the courts their powers to deal in rem with the vessels by sale, for that power was solely to sell, and deliver on sale, the vessel; it similarly took from the mortgagee in essence for the time being its mortgage rights, for its power also was solely to take possession of and sell and deliver on sale the mortgaged property. Also, if the very doubtful assumption can be made that some right could have been worked through a court in equity by which, in lieu of the sale and delivery of the vessel, a sale in some form might have been permitted of such rights as the mortgagor had, there would have been no general or satisfactory market for the problematical chose in action which alone could have been sold. Also, any suit, to have established and carried out any such novel remedy, would inevitably have been contested and carried to the highest court in view of the values involved, and could not have reached final decision except at large expense and at the end of a long period. The only practical thing to do was to wait, as the admiralty courts did, for the requisitions to be terminated.

The requisition at once involved the Trust Company in a further difficulty. Affreightment commitments had, before the requisitions, been entered into as to both vessels by the Company owners. Only a portion of the cargoes had been taken on board the vessels, but freight money had been received in advance apparently as to all the commitments. It would appear that it was the obligation solely of the Government to take care of this situation on its requisition, with the benefit to all parties having interests in the vessels to such exemption from liability as the doctrine of *vis major* would give and indemnity

to them by the Government from any liabilities created by its seizure of the vessels.

On August 12, 1918, the Shipping Board succeeded, however, in getting the two owning companies to sign and Fidelity Trust Company, through ill advice or improvidently, to join in signing the agreement, a copy of which is annexed to the petition of Fidelity Trust Company (R. 24 to 38; also R. 39 and 40, Finding 21). The provisions of the agreement which are material to this case are that the Shipping Board might unload the cargo which had been put on board the vessels and forward to destination all of the cargoes on which there had been commitments; that, out of the sums which might become due to the owner companies as just compensation, all costs, with interest, for doing this should be deducted, and finally, that, if there was a deficiency after applying such just compensation, the United States should have a lien upon the vessels, and both of them, for the deficiency in priority to the mortgage liens of the Fidelity. The unreasonableness and improvidence of this last provision is apparent in view of the fact that, even aside from the protection of *vis major,* there would be no lien attaching to the vessels in diminution of the Fidelity mortgage lien except of those particular shippers for whom cargo had been put on board and with an offsetting right in the mortgages to the freight money; also it would appear that the large extra charge ($150 [illegible] 33) for [illegible]"

RIDER FOR INSERTION page 11 immediately after paragraph ending "Should have been borne by the Government":

No lien, in fact, was acquired by the shippers for non-performance of the contract of carriage, as the requisition of the vessels by the Government operated to dissolve the contract of carriage and absolved the vessels and their owners from liability under it.

The Texas Co. v. Hogarth Shipping Co., Ltd., 256 U. S. 619, 629, 631. Vacuum Oil Co 248 U.S. Accordingly it was ruled that "the *owner* (italics [illegible]) accepts this requisition charter in full satis-

d. w. t. capacity and $380,623 on the H. M. Whitney of 3230 d. w. t. capacity (R. 32, Finding 10).

The taking of the vessels by requisition took away from the courts their powers to deal in rem with the vessels by sale, for that power was solely to sell, and deliver on sale, the vessel; it similarly took from the mortgagee in essence for the time being its mortgage rights, for its power also was solely to take possession of and sell and deliver on sale the mortgaged property. Also, if the very doubtful assumption can be made that some right could have been worked through a court in equity by which, in lieu of the sale and delivery of the vessel, a sale in some form might have been permitted of such rights as the mortgagor had, there would have been no general or satisfactory market for the problematical chose in action which alone could have been sold. Also, any suit, to have established and carried out any such novel remedy, would inevitably have been contested and carried to the highest court in view of the values involved, and could not have reached final decision except at large expense and at the end of a long period. The only practical thing to do was to wait, as the admiralty courts did, for the requisitions to be terminated.

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On December 4, 1918, there was further executed, between the Acme Steamship Corporation as to the J. S. Whitney, and the Whitney Steamship Company as to the H. M. Whitney, *nunc pro tunc* as of April 27 and April 28, 1918, so-called requisition charter parties (R. 41, Finding 22) by which it was provided that "the *owner* (italics ours) accepts this requisition charter in full satis-

faction of any and all claims *he* has or may have against the United States arising out of the requisition and accepts the compensation herein provided for as the just compensation required by law". It is on the basis of these instruments and the 5.15 and 5.65 per d. w. t. rates specified in them that the account of the Fleet Corporation (R. 50 and 51) was worked out showing nothing owed by the United States and a balance due to it of $77,068.54. The Government also contends that these charters, having been entered into by the mortgagors in possession of the vessels, did away with the requisitions altogether and cut out all rights of those holding liens on the vessels to any claim for just compensation to them based on requisition.

The answer of the Liberty Trust Company to these contentions is as follows:

> (1) That the owning companies were not in possession of the vessels, but that they were in possession of the courts in which the libels had been filed, subject to the rights of the Shipping Board in them through its requisitions (R. 38, Finding 19).
>
> (2) That it was only by virtue of these requisitions that the United States could continue to hold them, under the orders of the courts by which they had been turned over to the Board, as against the rights of all lien holders of all kinds in the court proceedings.
>
> (3) That in the order of the District Court of Eastern New York it was expressly provided that the vessels should be returned to that court to be dealt with under the lien libel on any termination of the requisition and that, with the Shipping Board continuing to hold them under that order, its status could not be changed to that of a charterer by agreement with the owners against whom the lien holders were endeavoring to enforce their claims.
>
> (4) That by the order of the South Carolina District Court it was provided that the amount to be paid for the use of the vessel requisitioned would be treated as in lieu of the vessel and that the lienors were entitled to priority to the owners "to any sum or sums to be paid on account of the requisition of

the vessel" (R. 38, Finding 18). That by this is meant, not such sum, insignificant or otherwise, as the adverse parties (the owning companies) might choose to agree to, but the just compensation provided by the statute.

(5) That by its express terms, the requisition charter provided only that the *owner* accepts this requisition charter in satisfaction of any and all claims that *he* has arising out of the requisition and the compensation provided for as just compensation (R. 41). The agreement, both in its terms and for the reasons above stated, can have no effect except as a settlement operating solely between the United States and the owners as to their claims and interest.

(6) That the requisition charter does not have the effect of enabling the United States to substitute, in determining under the August 12, 1918, agreement whether there was a deficit which would give rise to a lien on the vessels in favor of the United States, the amount which the United States, under the December 4, 1918 agreement, agreed to pay the owning companies, in the place of the "just compensation" according to law referred to in the August 12, 1918 agreement and as defined in

Seaboard Air Line et al. v. U. S., 261 U. S. 299
United States v. New River Collieries Co., 276 Fed. 690
United States v. New River Collieries Co., 262 U. S. 341;

also that if the contention is made that the question whether such a lien came into existence is of any materiality in this case, the burden is on the United States to prove, in establishment of any claim of such a lien, that just compensation to the owner companies for the use of the vessels, determined in the manner prescribed in the above cited cases, amounts to less than the cost of forwarding, etc., the cargoes, and, if so, how much less. There is a finding in the case as to going charter rates (R. 44, Finding 25) which, as computed and tabulated

in "Appendix 'A' ", appear affirmatively to show that, on figures based on just compensation, instead of figures under the agreement of December 4, 1918, taken by the Shipping Board in its account (R. 50 and 51), there was no such deficiency. If the meaning of the words "just compensation" as used in the August 12, 1918 agreement is open to any doubt, the extreme severity and, it would seem, unfairness, of that agreement, so far as concerns the Fidelity Trust Company, would seem to call for any admissible construction which would tend to protect it against such unfairness.

It is to be noted that no one having any interest in the requisitioned vessels has ever actually been paid anything for the year and three months' use which the United States had of the vessels or for any loss or damage suffered by them by reason of the requisitions.

What the United States did was to unload the cargo which was on board the vessels at the time of requisition and cause to be transported 16,412,939 pounds of cargo, or 7327 tons plus 459 pounds, to their destinations, for which it charged $703,560.33 (R. 42, Finding 23), in addition to which it made charges for $159,800.10 for discharging, storage, etc., of cargo on board at the time of requisition. Some time after the termination of the requisitions it made up an account by which, by charging these amounts and some other items and figuring its use at the $5.65 and $5.15 rates specified in the December 4, 1918 agreement, a balance in favor of the Shipping Board was arrived at (R. 50 and 51, Finding 33). This large charge of removing and storing the cargo which had been placed on board was solely an incident of and due to the requisition and should have been borne by the Government.

Except as to a remnant of 1007 tons and 459 pounds, the J. S. Whitney and the H. M. Whitney could, with

their d. w. t. of 6320, have completed the transportation of these cargoes in one voyage each and with no expense of removal of cargo. It is apparent that in arranging for the transportation of these cargoes the Shipping Board did not use vessels at the $5.65 or $5.15 rate to which they got the owning companies to agree as to the J. S. Whitney and H. M. Whitney, or exercise that keenness in behalf of those companies, as to compensation charges, which it exercised in behalf of itself as to the J. S. Whitney and the H. M. Whitney. The result was that the owning companies were charged more for two voyages required for the transportation of the commitment cargoes (plus the transportation of 1007 tons and 459 pounds) than was credited for the use by the United States of the J. S. Whitney and the H. M. Whitney for the fifteen months' period during which the United States had them. The United States made up an account as between it and the two owning companies (R. 50 and 51, Finding 32) and, on the strength of that account showing nothing owed to the owning companies, paid nothing to anyone having interests in the vessels, and contends that the Liberty Trust Company, as the holder of mortgage and repair lien claims antedating the requisition, is entitled to nothing.

(E) *The Impairment of the Mortgage and Lien Security Resulting from the Requisition Takings.*

The findings of fact appearing in the record establish, as scheduled below,

(1) that at the time of the taking there was, in the case of the J. S. Whitney, for the security of the $150,000 mortgage, a vessel market value of $261,490.55 in excess of the mortgage and that, as the result of the requisition, the detention of her under it, and the impaired condition in which she was returned, the margin of security had

been reduced to $126,771.93 or by an amount of $134,-718.62;

(2) that, on the return of the H. M. Whitney in July, 1919, a diminution of $174,406.60 in the security value had not only entirely wiped out the margin of security at the time of the requisition but had reduced the security value to an amount $128,046.93 less than the mortgage indebtedness.

SCHEDULE

SS. J. S. WHITNEY

April 27, 1918

Value in sound condition (R. 49, F. 32)		$544,000.00
Valk & Murdock lien (R. 37, F. 18)	132,509.45	
Mortgage to Fidelity Trust Co.	150,000.00	282,509.45
Margin of security		261,490.55

July 10, 1919

Value *if* in sound condition (R. 49, F. 32)		482,000.00
Cost of reconditioning (R. 43, F. 24 and R. 66)	52,377.26	
Valk & Murdock lien	132,509.45	
Int. thereon 6% Apr. 27/18—July 10/19 1 yr. 73 days	9,562.81	194,449.52
		287,550.48
Int. on Mortgage from maturity Apr. 30/18 (R. 37 and 61) to July 10/19 1 yr. 71 days		10,778.55
		276,771.93
Principal of mortgage		150,000.00
Margin of security		126,771.93
Impairment of Security		134,718.62

SS. H. M. WHITNEY

April 29, 1918

Value, in sound condition (R. 49, F. 32)		$500,000.00
Theo. Crane Sons lien (R. 38, F. 19)	253,640.33	
Mortgage to Fidelity Trust Co.	200,000.00	453,640.33
Margin of security		46,359.67

July 8, 1919

Value *if* in sound condition (R. 4⅞, F. 32)		436,000.00
Cost of reconditioning (R. 43, F. 24 and R. 66)	76,922.50	
Theo. Crane Sons judgment lien (R. 47, F. 29)	260,149.87	
Interest thereon—6% Aug. 16/18 to July 8/19 (326 days)	13,841.16	350,913.53
		85,086.47
Interest on Mortgage from Maturity June 4/18 (R. 37 and 61) to July 8/19 1 yr. and 34 days		13,133.40
		71,953.07
Deficiency to cover principal of mortgage		128,046.93
Total impairment of Security		174,406.60

The learned attorneys for the United States seek to avoid the effect of this serious impairment of the security on the H. M. Whitney by grouping the two securities and the two mortgages together (Brief p. 34). This is clearly untenable; they were separate mortgages with separate security.

(F) *The Basis in Law for the Contention of Right To Compensation For The Impairment of the Security Value.*

The right of compensation given by the statute is not confined to compensation to any one party having a vested interest in the res, but extends to all parties having such interest in accordance with their respective interests.

A. W. Duckett & Co. v. United States, 266 U. S. 149

where the United States requisitioned and took, on January 31, 1918, for temporary war use, the Bush Terminal, including Pier 8 on which the claimant held a lease running to September 30, 1919. The claimant was, in the Court of Claims, denied any compensation for the taking. This court reversed the decision, stating at p. 151:

> "Here the taking purported to be a taking of the Bush Terminal Dock, etc.—not of the title of the Bush Terminal Company, but of the things to whomsoever they belonged. The notice was 'to whom it may concern.' The claimant was turned out like the others. We can see no ground for attributing to the United States the extraordinary intent to recognize and pay for other interests but to exclude the claimant. The order made no such distinction but promised fair compensation, seemingly to all, and the appointment of a board of appraisers contemplated payment to tenants. Any arrangement that the Government may have made later with the owner to pay to it what might be due to the tenants or some of them did not affect the claimant's rights."

See also

> *Seaboard Air Line et al. v. United States,* 261 U. S. 299

where, under a statute similar to that involved in this case, the court says at p. 304 that the compensation intended to be given is "the full and perfect equivalent of the property taken", and

> *United States v. New River Collieries Co.,* 262 U. S. 341
> *United States v. New River Collieries Co.,* 276 Fed. 690 (C. C. A. 3rd Circ.)

as to the measure and scope of the compensation to be allowed.

The contention of the intervenor, as to its mortgage interests in the vessels, is that it was entitled, when the vessels were returned from requisition, to be in as good a relative position as to its mortgage security and the margin of it above the mortgage indebtedness as it was in when the vessels were taken by requisition, and that

the just compensation to which it is entitled is such sum as, with the vessels as they were as to value and condition when they were returned, would have put the mortgagee in that position. This amount, as figured in behalf of the intervenor in the Schedule *supra,* is $309,125.22. A certain margin of security is essential to cover expenses of foreclosure. Also the money value and safety of a mortgage and what the holder can, with a satisfactory result, do as to holding, disposing of or foreclosing it depends essentially on the margin of the security above the mortgage indebtedness.

The margin of security which the mortgagee had in April, 1918, was vital to the value and safety of its mortgages in view of the drop in the demand and freight rates of vessels (R. 44, Finding 25) and shipping values by July, 1919, which finally culminated in the shipping cataclysm of 1920, largely by reason of the operation of Shipping Board vessels left over from the war, at rates regardless of loss to the Government.

Parker v. New England Oil Corporation, 8 Fed. (2) 392 at 404.

President's Special Message to Congress, Congressional Record bound Vol. 63, pages 19 to 21.

After the vessels were returned in July, 1919, they could be operated only at a net loss. (R. 44, Finding 24.)

Until Congress provided for a preferred status for ship mortgages in the Ship Mortgage Act of 1920, full market value could never even approximately be obtained on a foreclosure sale of a ship mortgage, because of the unknown amount of numerous classes of liens which might come in ahead of the mortgage, including, in this case, any lien which the Government might claim under the August 12, 1918 agreement, the amount of which claim it never declared until November 1, 1926 (R. 50, Finding 32).

The Court of Claims failed to give effect in full to the intervenor's contention, but did allow the amount of $129,299.76 found by it to have been necessary to re-condition the vessels into the fit condition which they were in at the time they were requisitioned.

The intervenor has presented the full grounds of its claim for compensation, including in the computation the expenditures made and found by the Court of Claims to have been necessary to put the vessels into fit condition after they were returned as was the case when they were taken on requisition. This has been done, not with the conception that the intervenor can have the judgment in its favor increased in this proceeding, but in view of the contention in behalf of the United States that there was error in the reasoning on which the Court of Claims based its judgment for $129,299.76 and in view of the well established law that, if a judgment is not in excess of what the party was entitled to on a proper application of the law to the facts, the judgment will not be reversed because of any errors in the reasoning by which the lower court reached its conclusion.

Langnes v. Green, 282 U. S. 531 at 536 and 539.

See also

Revised Statutes, Sec. 726, Act of Feb. 26, 1919, c. 48 (40 Stat. 1181)

providing that:

> "On the hearing of any appeal, certiorari, etc., the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The intervenor is entitled, in any event, to recover for the impairment of its security on the H. M. Whitney mortgage.

The mortgagee's security on the H. M. Whitney had become so greatly impaired during the Government's possession under the requisition that when the requisition terminated on July 8, 1919, the vessel, if she had then been sold for her then full sound value as found by the Court below, less the cost of reconditioning and without any expenses incident to the sale, would have brought only $85,086.47 above the judgment maritime lien of Theo. Crane Sons, or $128,046.93 less than the principal of the Fidelity Trust Company's mortgage and interest from its maturity (Schedule, *supra*, p. 17).

Interest from the maturity of the mortgage is a proper charge.

> *Dodge v. Perkins*, 9 Pickering 368, 385; *Robinson v. Bland*, 2 Burr. 1086.

The intervenor is, we submit, clearly entitled, in any event, to recover this deficiency of $128,046.93. As the Court below points out, the Government took possession of the ships shortly before the mortgage notes became due and the mortgagee could not obtain possession of the ships until the Government had released its requisition (Op. R. 62). It would have been an idle gesture for the mortgagee, during the period of the Government's possession, to have taken proceedings (if any such were available) to establish its right of possession except as against the Government, as the Court below suggests (Op. R. 63). It did, in fact, take possession through A. L. Crowley on the termination of the requisition (Finding 24, R. 43-44), which was the earliest time it could have done so after the commencement of the requisition.

The requisition took from the mortgagee its right to realize on its mortgage during the time the Government was in possession under the requisition. The effect of the Government's action was to make it impossible for the mortgagee to realize by $128,046.93 the amount due it on the H. M. Whitney mortgage; although it could have realized the full amount of the mortgage indebtedness except for the requisition (Schedule, *supra,* p. 17).

We submit that the intervenor is entitled to have this loss made good to it by the Government under the provisions of the Act of June 15, 1917 (c. 29, 40 Stat. 182) as interpreted by this Court in the Duckett case, *supra,* at top of page 18.

II.

THE JUDGMENT OF THE COURT OF CLAIMS IS SUPPORTED BOTH BY FINDINGS OF DAMAGE DONE DURING THE REQUISITION AND OF SUCH INJURY TO THE INTERVENOR THEREBY AS ENTITLED IT TO COMPENSATION IN THE AMOUNT AWARDED.

A. *The record contains the findings necessary to establish liability.*

In order to compensate for (*i. e.* to be equivalent to) the damage done, the amount awarded had to be sufficient to put the vessels back in the "staunch, strong, seaworthy" condition and "good repair" which they were in when taken (R. 49). It is clear from the opinion (R. pp. 65 and 66) that this is the measure of damages which the Court applied. We do not understand that, except for their point as to the requisition charter party, the Government denies the correctness of this measure of damages. Its contention is that the actual findings do not provide a proper factual basis for applying the said rule of damages, because it is said that it is not expressly found that the expenditures were necessary to restore the vessels to the condition in which they were when taken (Ass't. of Error No. 4, R. 5, Br. 21).

While, as has been said by this Court in *Stone v. United States,* 164 U. S. 380, this Court cannot refer to the opinion for the purpose of eking out the findings, it is none the less appropriate to read the findings in the light of the opinion. The opinion can properly be a deciding element in determining what the Court of Claims meant by any form of words used in the findings.

The case of *United States v. Wells,* 283 U. S. 102, was a suit to recover an additional estate tax paid in respect of certain property which was the subject of certain transfers claimed by the Commissioner of Internal Rev-

enue to have been made in contemplation of death. The crucial fact, therefore, was whether the transfers had been made in contemplation of death. The Chief Justice, in delivering the opinion of this Court, said, at page 111:

> "The Court of Claims did not find, in terms, that the transfers in question were not made in contemplation of death, but it is evident that the Court considered that its findings of fact amounted to that in substance, in view of the conclusion of law, based upon these findings, that the executors were entitled to recover the additional tax. This is also manifest from the opinion."

Applying the principle of *United States v. Wells* to the question in the instant case of whether the Court of Claims considered that its findings of fact amounted in substance to a finding that $129,299.76 was necessary to restore the vessels to the condition in which they were when taken, we find that the Court of Claims expressly found the following:

(1) When taken, the vessels were in all respects staunch, strong, seaworthy and in good repair (Finding 32, R. p. 49).

(2) When returned, the vessels were both in need of repairs (Finding 28, R. p. 46).

(3) The mortgagee paid $136,464.76 for sundry services and materials in connection with the two vessels (Finding 24, R. p. 43).

(4) Nearly all of this amount was for direct repairs (Finding 24, R. p. 43).

(5) There were some payments for surveys and port insurance, which were necessary expenses (Finding 24, R. p. 44).

(6) Two specific items aggregating $7,165 were not shown to have been in the nature of repairs or reconditioning worn parts of the vessels (Finding 24, R. p. 44).

The Court then concluded (R. 51) that the intervenor was entitled to recover the sum of $129,299.76, which exactly equals the $136,464.76 expended, less the $7,165 not shown to have been for repairs.

We submit that these findings and the conclusion without regard to the opinion show that the Court of Claims intended to find, and did find, the necessary cost of restoration. When to this we add, as an aid to interpretation, the opinion, and particularly the language of the Court on page 66, where they say:

> "The various items which made up these two expenditures all appear to be necessary expenses in reconditioning the ships, except a total of $7,165 expended for life boats. Deducting this amount, there were expended by the Trust Company for reconditioning the ships $129,299.76, which we think the intervenor is entitled to recover, together with interest from October 1, 1919."

the conclusion is inescapable that the Court deemed that the issue before it was to find the fair cost reasonably necessary to restore the vessels, and that it was the sum so determined that it awarded.

The defendant in its brief makes the following three arguments on the point that the judgment is not supported by the findings:

The first is based on the assumption that the Government is not liable to pay compensation for wear and tear (Br. 22). They cite no authority for this novel proposition, and we believe that none is necessary to refute it.

The second argument is that the absence of direct evidence is fatal to a finding by the Court of Claims (Br. 22). As it does not appear what indirect evidence there may have been on which to base the findings, it is submitted that the argument is unsound.

The third argument is that because the necessity of the expenditures did not appear from the Defendant's request for findings number XXVI there was a failure of proof (Br. 23). As this is based wholly on matters outside the record in this Court it may, we suppose, be disregarded. *Rogers v. United States,* 270 U. S. 154.

It is submitted that the record amply establishes the fact and amount of the Government's liability for damage to the vessels.

Stress is laid in behalf of the United States on the survey as to reconditioning which was made by a representative of the United States and a representative of the owning companies, with the Fidelity Trust Company not being represented in the survey. Aside from the point that no such survey in which the Fidelity Trust Company was not represented can in any way bind the Trust Company, it may be fairly stated that if the representative of the owning companies was as improvident and unreliable as its representatives appear from the record to have been in general in the conduct of their business, conclusions concurred in by him would be of slight value. Also, the actual cost of conditioning a vessel is much more conclusive than any preliminary estimates.

It is well established that findings of fact of the Court of Claims have the same effect as jury findings.

United States v. Wells, 283 U. S. 102,

at page 120, where the Court says:

> "Findings of fact of the Court of Claims are to be treated like the verdict of a jury."

(B) *The intervenor had a sufficient interest in the requisitioned vessels to entitle it to compensation.*

While the Government is correct in its statement as to the absence of an express finding on the law applicable to the mortgages, it appears from the opinion of the Court of Claims (R. p. 61) and from the language of the petition for certiorari (R. p. 7) that the parties tried the case in the Court below on the theory that the mortgages were Massachusetts mortgages. (See also opinion, R. 62.) No question was raised in the petition for certiorari as to the fact that the mortgages were Massachusetts mortgages, and we submit that the point should not considered as raised here.

> *Alice State Bank v. Houston Pasture Co.*, 247 U. S. 240, 242.
> *Webster Co. v. Splitdorf Co.*, 264 U. S. 463, 464.
> *Steele, Executor, v. Drummond*, 275 U. S. 199, 203.
> *Commercial Credit Co. v. The United States*, 276 U. S. 226, 228.

The Government contends that state law is not binding in this proceeding in any event. While we do not believe this point to be well taken, it does not help the position of the Government. Clearly, in the absence of a Federal statute as to ship mortgages (and admittedly there was none until 1920), the common law would control. It is, of course, well established that at common law a mortgage—be it of a ship or other species of personal property—passed title, and that the lien states represent a departure from the common law mainly by statute, although in some cases by judicial legislation.

Considered as Massachusetts mortgages, there can be no doubt of the intervenor's legal title to the vessels, and, we submit, the rights given to mortgagees under the long established law of the Commonwealth are not merely rules of damages, but are a necessary and logical inci-

dent to the title vested in the mortgagee. One of the incidents of such title is that the mortgagee can recover for injury to the mortgaged property, whether or not the mortgagee is in possession and whether or not the sufficiency of his security is impaired.

Delano v. Smith, 206 Mass. 365, at page 369.
Morgan v. Gilbert, 2 Fed. 835.
Wilmarth v. Bancroft, 10 Allen 348.
Gooding v. Shea, 103 Mass. 360.
Byrom v. Chapin, 113 Mass. 308.
Searle v. Sawyer, 127 Mass. 491.
James v. Worcester, 141 Mass. 361.
Stewart v. Finkelstone, 206 Mass. 28.
Holmes v. Sprowl, 31 Me. 72.
Foster v. Perkins, 42 Me. 168.

The Government contends that the principle of the cases which give the mortgagee compensation for the taking or damage of mortgaged property, is not founded upon the mortgagee's interest in the property, but upon the *wrongful* nature of the defendant's act (Ass't. of Error No. 2, R. 5, Br. 30). This is apparently based on what we conceive to be the erroneous assumption that there are but two classes of takings—rightful takings and wrongful takings. In fact there are three distinct situations: (1) a taking by consent, (2) without consent or right, and (3) without consent but by right of sovereignty. The Government argues from cases holding that there is no cause of action for a deprivation which has been consented to that there is no right to compensation for a deprivation *in invitum*. The element of whether the injury can be justified as an exercise of paramount authority in no way affects the right of the injured party to compensation, which is in either case payable on account of the injury. That a mortgagee not in possession may recover for a taking by eminent domain is shown by the decision of this Court in *Chicago*

v. Tebbetts, 104 U. S. 120. The Government attempts to distinguish this case, on page 32 of its brief, on the ground that the mortgaged property was destroyed. There is nothing in the opinion of this Court to indicate that the result would not have been the same had the taking resulted in a partial destruction of the security as distinguished from a total destruction.

It appears clear from the case of *Chicago v. Tebbetts, supra,* that the right of the mortgagee to compensation, according to his interest, on the taking by eminent domain, whether by requisition or otherwise, is not dependent on the particular view taken in any state as to the exact nature of his right or title, or whether he was or was not in possession at the time of the taking. See also *Hutchins v. King,* 1 Wall. 53.

Putting an extreme case to test the principle, suppose that there is a value in the property only slightly above the mortgage, that the war is long continued and the vessel put to such severe use that the value, on return from the requisition, amounts only to a small percentage of the amount of the mortgage liens: Is it conceivable that the mortgagee would be held to be entitled to no compensation either because the property had not been completely destroyed, or because he was not in possession under his mortgage or had only a lien as against a title right? It is to be noted that holders of admiralty liens have no title interest but only a lien interest. Are they to be deprived of the value of such interests by a requisition on the grounds that they are not in possession, or have no title interest?

If the question whether the mortgages were Massachusetts mortgages duly recorded at the office of the Collector of Customs in Boston is before this Court on the certiorari petition and is deemed vital to the question of recovery, the case, in accordance with the practice stated in *Luckenbach S. S. Company v. United States,* 272 U. S.

533, at page 539, should be remanded to the Court of Claims for further findings on this point.

C. *The effect of the inadequacy of security.*

The attorneys for the Government in a footnote to page 34 repeat the error in their statement as to the security of the mortgages at the time of the release of the vessels from requisition by treating the mortgages and maritime liens as attaching equally to both the vessels, and by omitting interest on overdue mortgages and a judgment of the District Court, and also by treating the damaged vessels as if they had the value of ships in good repair. As we have already pointed out on page 17 of this brief, it is manifestly improper to group the two securities and the two mortgages together. As shown by the tabulation on pages 16 and 17 there was a deficiency at the time of the return of the H. M. Whitney of $128,000. As to the J. S. Whitney, the tabulation shows that the margin of security had been more than cut in half, even on the Government's theory of computing impairment of security.

The Government's theory assumes that a vessel out of repair could be sold for the full amount of the market price less the cost of repairs. It is an assumption contrary to known fact that a vessel in a condition requiring $52,000 of repairs and almost two months' time in which to make the repairs could have been sold for the price of a sound vessel less the actual cost of repairs. If charter hire for the period of repairs taken at the rate specified in the requisition charter party be added to the deduction for the cost of repairs, it would wipe out a substantial part of the margin. Add to these elements the fact which is common knowledge that at the time of the release of these vessels the market was rapidly falling, due to the sudden flooding of the market by the

return of requisitioned vessels and the availability of Shipping Board vessels, and it becomes even more apparent that the mortgagee, instead of having the security it had contracted for, had returned to it a vessel from which it could not have realized the amount of its mortgage.

It is further to be borne in mind that during this period, at which the Government says that the mortgagee could have sold the vessel and come out whole, the Government was claiming a lien of unascertained amount (Finding 33, R. 50) and that it is only by eliminating this asserted lien that the value of the security is not so reduced as to show an excess of mortgage over value substantially equal to the repair bill. The chances of the mortgagee's selling anyone a lawsuit with the Government were absolutely nil.

It is submitted that even if the mortgagee had not had the title given to it as grantee in a Massachusetts mortgage, but had had merely a lien on the vessels, the record amply shows impairment of its security sufficient to entitle it to recover for the physical injury done the vessels during the period of the requisition.

As the Government was liable for physical injury done to the J. S. Whitney during the period that it was held under requisition, the question of whether that element of compensation was payable to the mortgagor or the mortgagee is merely a question of the relative rights of those two parties. In determining the respective rights of the parties, it is immaterial, if the mortgagee's security is inadequate, what the cause of such inadequacy may have been. It is perfectly immaterial whether the Government was responsible for the inadequacy or whether it arose from some other cause. Therefore, whether or not the Government was under any obligation to pay compensation to anyone for reduced salability due to the

depreciation in market values, and due to the impossibility of sale, owing to the Government's claim of lien in an indeterminate amount, those points must be taken into consideration in determining whether, as between the mortgagee and the mortgagor, the mortgagee had, without collecting the compensation due for the damage to the vessels, enough other security for his protection. It is submitted that on the record in this case it appears that the mortgagee did not have that protection.

D. *The Mortgagee, as against all Parties but the Maritime Lienors, is to be considered as Mortgagee in Possession.*

The rule as to whether the cause of action is in the mortgagee or the mortgagor is based on the question of which of the two parties is in possession. There is no doubt that a mortgagee in possession can recover irrespective of impairment of security. At the time of the requisition of the J. S. Whitney, neither the steamship corporation nor the trust company was in possession, by reason of the proceedings in the Admiralty Court on libel by Valk & Murdock. (R. 38) Three days later, the mortgage on the J. S. Whitney matured (R. 37, 60). Thus at the time the injury was done to the vessels, both the mortgagor and the mortgagee were out of possession, and both were kept out of possession by the requisition until July, 1919 (R. 46). But for the requisition, the mortgagee could have enforced its rights by paying off the maritime lien and taking possession from the marshal. The rights of the mortgagee were at all times superior to those of the mortgagor. It is submitted that the Government, whose claim is in the right of the mortgagor, cannot properly raise objections to the mortgagee's claim on the ground that it was not in possession at the time the injury was done when the real

reason that the mortgagee was not in possession was the act of the Government itself in taking and holding the ship.

Nor does there seem any sufficient reason for applying the limitation to a case where before payment of compensation for the damage, the mortgagee has entered into possession of the vessel and properly filed its claim. Since the compensation is awarded for the purpose of making good the damage, it would seem that where the claimant's interest in the property, together with the right to possession of it, arose prior to the injury, and it is at the time of making claim in possession of the property and has actually made at its own expense the repairs for which compensation is to be awarded, no good reason exists for holding the mortgagor to be entitled thereafter to receive the compensation. In the instant case, the Government asserts, by claiming a set-off, a right through the mortgagor, and therefore stands in no better position than the mortgagor.

The instant case is closely analogous to that cited by the Court of Claims, *George Adams & Frederick Co. v. South Omaha National Bank*, 123 Fed. 641. In that case, the bank held a mortgage on 482 steers. The defendant removed 157 of these steers from Nebraska, and sold them in Chicago for the purpose of being slaughtered. The suit was for the recovery of the proceeds of sale of this portion of the mortgagee's security. The Court pointed out that the injury was not merely a temporary interference with the possession of the mortgagor for which he alone could sue, but consisted of an act whereby the mortgagee's security was destroyed. The Court said:

> "We can conceive of no sufficient reason why, under such circumstances, the wrongdoer should not be held liable to the mortgagee."

Nor does there seem any greater reason why in the instant case, the Government having failed to keep the vessels in repair and thereby destroyed over $129,000 of the intervenor's security, the showing of these facts and the nature of the intervenor's interest did not make out a case for compensation under the Act of June 15, 1917.

E. *Compensation due to the Mortgagee is not a subject of set-off under the Agreement of August 12, 1918.*

The Government places reliance on paragraph 2 of the agreement of August 12, 1918 (Br. 38), which contained provisions for setting off the compensation which might thereafter become due to the owners for the requisition against expenses incurred by the Government in connection with forwarding the cargoes, and on paragraph 4 of this agreement, which contained provisions for a lien on the vessels to secure any excess of forwarding charges remaining after a set-off under paragraph 2. We have argued elsewhere in this brief that the compensation to be set off against the forwarding charges was the statutory compensation and not the payment stipulated in the requisition charter parties and that as that shows a balance against the Government, compensation for the damage to the vessels was payable in cash and to us.

Even if the Court should hold that the charter party rates could be used as a measure of the Government's liability for the purpose of set-off under the agreement, paragraph 2 does not give the unlimited right of set-off claimed by the Government. We wish to point out an inaccuracy in the Government's statement of the provisions of this agreement (Br. 13). This is not by way of captious criticism, but because we think that the very point in which the agreement itself differs from the state-

ment in the Government's brief is highly indicative of the difference between the intent of the parties and the construction contended for by the Government. On pages 13 and 40 of their brief, at the end of Section IV, it is stated that the mortgagee agreed that *all payments on account of just compensation should be made to the mortgagor.* The agreement did not say *all* compensation. It said "all compensation which shall hereafter become due to the parties of the second part," *i. e.*, the steamship corporations. Furthermore, it was not contemplated that the mortgagors should ever touch a penny of compensation.

Compensation in eminent domain is universally thought of in terms of the thing taken, and not in terms of interests of persons therein. In the present statute it is not provided that compensation shall be made to persons, but for the requisition. When, therefore, in drawing the agreement of August 12, 1918, the parties departed from the words of the statute and added the words "due to the parties of the second part" they cannot be said to have meant thereby *all* compensation, but only such part of it as was due the steamship corporations, as distinguished from the part due the mortgagee.

The Government had taken the vessels in which the cargoes would otherwise have been forwarded and necessitated the use of other vessels. The charter hire of the requisitioned vessels was deemed to offset the charter hire of the vessels substituted. That which was considered as due the steamship corporations was, we submit, only the amount which was compensation for deprivation of use of the vessels. To that part of the compensation which might become due for damage sustained during the period of the requisition, the mortgagee was entitled. Its claim thereto was not waived, and was not within the Government's right of set-off.

III.

THE COURT OF CLAIMS HAD JURISDICTION OF THE CASE.

A. The Intervenor's Claim is for Just Compensation Under the Act of June 15, 1917.

The Court of Claims has jurisdiction to hear and to determine claims for compensation under the Act of June 15, 1917 (c. 29, 40 Stat., 182), because the Act expressly provided for suits "in the manner provided for in Section 145 of the Judicial Code." The only question, therefore, on the jurisdictional point raised by the Government is whether the intervenor's claim was for compensation under that Act. We believe that the allegations of the intervenor's petition (R. 16-24) demonstrate this fact. The petition set up that the intervenor was the holder of mortgages on the requisitioned vessels, that by the requisition the intervenor had been prevented from foreclosing its mortgages, and that by reason of the requisition the total value of the security had been destroyed (par. XVIII-A, R. 22). It then set out (paragraph XVIII-C, R. p. 23) that its claim was made under the Act of June 15, 1917, and claimed as compensation the full amount of the mortgage debts and such other relief to which it might be entitled.

It is submitted that the situation in the present case is analogous to that in the case of *A. W. Duckett & Company, Inc. v. The United States*, 266 U. S. 149. In that case, the President under the Act of August 29, 1916, had taken possession of a portion of the Bush terminal docks and warehouse property in Brooklyn. The claimant was a lessee of a portion of the premises taken. This Court, speaking by Mr. Justice Holmes, at page 152, said:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order, and there is no doubt concerning the jurisdiction of the Court of Claims."

It is submitted that the intervenor's petition falls squarely within the jurisdiction expressly conferred on the Court of Claims.

B. The Claim Being for Compensation Payable Under An Act of Congress Conferring Jurisdiction on the Court of Claims is Not a Tort Claim.

The particular ground which the Government's specifications of error assigned as supporting the contention that the Court of Claims lacked jurisdiction was that the intervenor's claim is one sounding in tort (Ass't. of Error No. 1 R. 5). As the claim was founded on an Act of Congress, the limitation as to claims sounding in tort was not applicable.

Dooley v. United States, 182 U. S. 222.

Therefore, we take it that the Government must mean that the intervenor claimed compensation for something for which the Government had not by the terms of the Act of June 15, 1917, agreed to pay. The nature of the injuries caused by a conversion and by a taking by eminent domain are similar, the main difference between the two cases being that the first is an appropriation without right, and the second an appropriation by the right of constitutional authority, with an agreement for compensation for the injury. The fact that the injury complained of would have been a tort if committed without such authority and without provision for compensation does not make the claim any the less a claim for compensation if the injury is one for which Congress has authorized payment.

It is submitted that injury to the physical condition of vessels while appropriated to the Government war service must have been within the scope of the compensation contemplated by Congress. It could hardly be contended, if the Government had requisitioned a vessel and the next day had wrecked it, so that it was a total loss, that one day's charter hire would be the just compensation required to be made under the Act. Just compensation means full and fair compensation which will put the injured party in the position in which he would have been but for the injury.

> *Seaboard Air Line Ry. v. United States,* 261 U. S. 299.

Surely, therefore, a claim for the equivalent of the security lost by the damage which was caused during the period of the requisition cannot but be a claim for compensation for which the intervenor was expressly entitled to sue in the Court of Claims in the manner provided in Section 145 of the Judicial Code.

C. The Government's Contention With Regard to Matters Not Raised in the Petition for Certiorari.

The Government in its brief has attempted to support its jurisdictional point by arguing three alleged errors not mentioned in the petition for the writ of certiorari. They are not, therefore, under the rules of this Court within the scope of the review granted by the Court, and we submit that they should not be considered.

> *Alice State Bank v. Houston Pasture Co.,* 247 U. S. 240, 242.
> *Webster Electric Co. v. Splitdorf Electrical Co.,* 264 U. S. 463, 464.
> *Steele, Executor, v. Drummond,* 275 U. S. 199, 203.
> *Commercial Credit Co. v. United States,* 276 U. S. 226, 228.

If the Court should deem that these matters merit consideration, we submit that the Government's contentions are not well founded.

The first of these unassigned errors is that the intervenor's claim is not for compensation under the statute, because not arising *ipso facto* upon the Government's assumption of possession. This contention, we believe, is disposed of by what has been pointed out above; namely, that the Government's promised compensation includes damage to the property taken, whether the damage occurs *ipso facto* upon the taking or subsequently during the period of the taking.

The fact that the owners and the Government made requisition charter parties to which the intervenor was not a party could not affect the rights of the intervenor. The making of those charter parties did not operate to release the vessels from the Government requisition. Just as surely as the original requisition took from the owners the right to be in possession of the vessels, it took from the mortgagee the right to get into possession of the vessels. The defaults which gave the Intervenor the right to oust the owners occurred very shortly after the requisition (R. 37, 60), but these defaults could not be availed of until the ships were finally released in July, 1919, the mortgagee's rights of foreclosure were no more enforcible against the vessels on December 5, 1918, after the requisition charter parties had been executed, than they were during the preceding period of the requisition.

The suspension of the right of foreclosure occasioned by the original requisition was not ended by the change in the relation between the owners and the Government. The fact that the owners entered into a requisition charter party, however it may have affected the basis for compensation between the parties thereto, did not prevent compensation from accruing to other parties in re-

spect of injury to their interests arising out of the Government's action. While the owners might have given the Government the free use of the vessels so far as the owners were concerned, the fact remained that their predecessor had transferred the title to the vessels to the intervenor's predecessor as security for its debt, and for that reason the owners could not give to the Government the right to destroy the vessels or impair the security without compensation to the intervenor.

The second of the unassigned errors which the Government argues is based on the contention that the claim of the intervenor first accrued on the release of the vessels from the requisition, rather than on the disallowance of the claim by the Shipping Board, and that therefore the claim is barred by the Statute of Limitations (Section 156 of the Judicial Code). It is submitted that the language of the Act of June 15, 1917, amply demonstrates the unsoundness of this contention. The Act says:

> "If the amount so determined by the President is unsatisfactory to the person entitled to receive the same, such person * * * shall be entitled to sue the United States * * * ."

Obviously, the person entitled cannot tell whether he is going to be satisfied until the President has first, through the Shipping Board, made the determination, and the claim does not accrue until there has been an unsatisfactory determination.

It is well established that when Congress gives a governmental department jurisdiction to pass upon claims the Statute of Limitations does not begin to run until final action is taken on the claim by that department.

> *United States v. Lippett*, 100 U. S. 663 at 668.
> *United States v. New York*, 160 U. S. 598 at 617.
> *Smith v. United States*, 67 Court of Claims, 182.

The third of the unassigned errors which the Government argues is that the original proceeding in which the mortgagee intervened is not within the jurisdiction of the Court of Claims, as the matter was, under the Suits in Admiralty Act of March 9, 1920 (c. 95, 41 Stat. 525) within the exclusive jurisdiction of the District Courts, because the original plaintiff was a party to the requisition charter party and claimed compensation thereunder. Without considering whether there would have been anything in this contention if the facts were as stated by the Government on page 19 of their brief, it is a sufficient answer that they have not stated the facts correctly. In the first place, the original plaintiff was the Acme Operating Corporation. The party to the requisition charter party covering the J. S. Whitney was the Acme Steamship Corporation, and the party to that covering the H. M. Whitney was the Whitney Steamship Corporation (Rec. p. 41). Secondly, while a claim by either of the last two named corporations *for compensation due under the terms of the charter parties* might not have been within the Court's jurisdiction, such was not the nature of the claim filed. The actual claim was not by the steamship corporations, but by the operating corporation, on the ground that it held charters of the vessels from the steamship corporations, and that the requisition had deprived it of possession of the vessels, wherefore it claimed compensation under the Act. This was a claim which the Court was expressly given jurisdiction to hear and determine. It did hear and determine it, and on the merits found that the plaintiff was not entitled to compensation.

Nor is the statement of the Government that "the mortgagee sought only to share in any recovery which might be allowed the Acme Operating Company" (*sic*) (Pet'rs. Br. p. 20) in accordance with the facts. As

pointed out above, the intervening petition set forth in the record on pages 16 to 24 asserts an independent claim based on title as mortgagee. That the Court did not agree with the intervenor's contention as to the amount of damage done it does not change the nature of its claim. It was filed and allowed as a claim for compensation for the injury to property the title to which was vested in the intervenor.

D. The Case of Matson Navigation Co. v. United States is Not Applicable.

The case of *Matson Navigation Co. v. United States*, 284 U. S. 352, relied on by the Government, is not in point.

The Government's argument that this decision applies to the instant case is based on the assertion that the claim of Acme Operating Corporation, petitioner in the Court of Claims, "arose upon a charter party", and that therefore its cause of action was under Section 2 of the suits in Admiralty Act (41 Stat. 525), and that the intervenor's claim fails because the Court had no jurisdiction over the petitioner's claim. (Govt. Br. 10-11, 15-16, 19-20.)

In the *Matson* case suit was brought in the Court of Claims for the recovery of increased wages and bonuses paid by the petitioner, who was the owner of several steamers which it was operating for the United States under requisition charters. The cause of action arose solely under the tenth clause of these charters, (284 U. S. 354; 72 Ct. Cl. at 211) and was therefore exclusively a claim for breach of maritime contracts between the United States and the petitioner.

In the instant case the claim of the petitioner Acme Operating Corporation was not, as the Government asserts, based on a maritime contract; it was for just com-

pensation for the alleged taking of the petitioner's property resulting from the requisition of the steamers (R. 13-15; opinion R. 51, 54, 60). The defenses interposed by the Government to the petitioner's claim show that the Government conceded that the petitioner's claim came under the Act of June 15, 1917, and was within the jurisdiction of the Court of Claims (R. 54-55). The Government's present position is entirely inconsistent not only with the facts, but also with its position in the Court below.

The claim of the petitioner, Acme Operating Corporation, was dismissed because it was found to be the alter ego of the Steamship Corporations, and therefore precluded by the contracts between the Steamship Corporations and the Government from recovering for its alleged injury to its property rights as the result of the requisition (R. 59).

Although the above considerations are, we submit, sufficient to dispose of the Government's contention that the petitioner's cause of action was one in admiralty, we would also point out that the Court below found that both steamers were requisitioned for military purposes, (Finding 16, R. 37) and were used in the service of the army (Finding 21, R. 39). Therefore, even if the suit had been on the requisition charters, the Suits in Admiralty Act would not have applied. Section 2 of that Act provides that jurisdiction in the District Court is conferred only when the vessel involved was employed by the United States as a merchant vessel (41 Stat. 525).

IV.

THE PLEADINGS ARE SUFFICIENT.

It is contended by the Government that the intervening petition did not contain sufficient allegations to justify the awarding of compensation for the physical injuries

done to the vessels during the period of the requisition (Ass't of Error No. 5, R. 5, Br., p. 25, *et seq.*). As pointed out above, the petition set up that the intervenor had made loans on the two requisitioned vessels secured by mortgages recorded in the office of the Collector of Customs at Boston; that thereafter, on or about April 27 and April 29, the Shipping Board requisitioned said vessels and held them until released from requisition in July, 1919; that the vessels when released from requisition in July, 1919, had no market value and that by reason of the requisition by the United States its security as mortgagee was rendered worthless. The petition further alleged that the claim as assignee of the mortgages was made in accordance with the provisions of the Act of June 15, 1917. Wherefore, the intervenor prayed that the United States be ordered to pay the amount of the mortgages, plus interest, and for such other and further relief to which it might appear the petitioner was entitled. While the claim of the intervenor was based on the contention that the vessels had, during the period of requisition, become so far worthless that its security was wholly destroyed, the allegations formed an appropriate basis for proof of damage to the vessels and the intervenor's security by physical injury to the vessels while in the Government service.

As was said by this Court in the case of *Clark v. United States*, 95 U. S. 539, at 543,

> "If objected that the petition contains no count upon an implied contract for quantum meruit, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition although due in a different aspect from that in which his demand is conceived."

Furthermore, it is fully apparent from the record in this Court that the case was tried below by both sides on this question of damage to the vessels, and in this connection we beg leave to call the attention of the Court to what the court below said on this matter (Rec., p. 65):

> "* * * it should be observed in this connection that this matter is specifically argued both by the Intervenor and counsel for defendant without any objection being made on account of the indefinite nature of the pleadings or motion for a more specific statement."

It is submitted that this contention falls within the rule laid down in *Wisconsin Central Railroad v. United States*, 164 U. S. 190, at 212, and repeatedly followed, where the Court said:

> "The record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the Court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demanded."

See also *Huse v. United States*, 222 U. S. 496.

V.

THE INTERVENOR'S POSITION AS SUCCESSOR TO THE RIGHTS OF THE MARITIME LIENORS.

The Government argues that the intervenor was entitled to nothing as successor to the maritime lienors for four reasons:

(1) Because the Court below did not grant judgment on that basis. The statute cited at the end of part I,

supra (40 Stat. 1181), and the decisions of this Court show that a judgment will not be reversed if on the whole record the claimant is on any theory entitled to the relief awarded. See also *Clark v. U. S.*, 95 U. S. 539, *supra.*

(2) Because the claim was one over which the court had no jurisdiction. This objection is no better founded as against the lien claims than against the mortgage claim and its unsoundness has been shown in part III, *supra.*

(3) Because the maritime lienors, by reason of the decrees in the admiralty cases were not injured by the requisition. As the Government paid no attention to the decrees, and did not comply with them, this contention comes with ill grace. See part I, Sections (D), (3) and (4), *supra.*

(4) Because the Government requisitioned nothing from the maritime lienors the liens were not impaired. The first half of this proposition is not so on the facts and the second half is immaterial.

The vessels having been arrested on the libel proceedings at the time of requisition, the possession of the admiralty courts was in equity that of the lienors on whose behalf the possession had been taken. The Government took the possession of the vessels away from the Courts in truth and substance. The fiction of calling the officer placed by the Shipping Board in command of one of the vessels a deputy marshal did not change the essential nature of the situation.

The Government therefore took the vessels from a lienor in possession. That status gave the lienors the first compensation payable for the requisition and was so recognized by the Admiralty Court. The steamship corporations had no rights which they could by private contract give the Government. The whole situation had been taken out of their hands by the courts. The counsel

for the Government seek to becloud this issue by saying that the Government had not totally destroyed the vessels, but had left enough to cover the liens. That is totally immaterial. We repeat—the first compensation payable belonged to the lienors—impairment of lien has no bearing on the question of the rights of a lienor in possession.

Nor is the agreement of August 12, 1918, of any importance in this connection. The claim as successor to the lienors is not based on any claim held or money invested in the situation at the time of entering into the agreement. It relates to claims which were in the hands of wholly independent third parties at that time. These claims were not mentioned in the agreement. On no possible construction can the statement that the lien for forwarding expenses shall be superior to the mortgage liens of the Fidelity Trust Company be held to mean superior to the maritime liens of Valk and Murdock or Theodore Crane's Sons. The intervenor's claim as successor to the construction companies is in respect of new and different money paid by it for the claims and the putting in of such new money gives it all and the same rights to claim compensation that the construction companies had. The Government can no more claim a set-off against the lien claims in the intervenor's hands than it could have claimed a set-off against Liberty bonds if the intervenor had used its money to buy that sort of Government obligations instead. At the time the vessels were released from requisition, Theodore Crane's Sons Company had a judgment lien of $260,149 on the H. M. Whitney and Valk & Murdock Company had a lien of $132,519 on the J. S. Whitney, plus in each case additional sums for in-

terest (R. 47), making a total more than three times the amount of the judgment in this case.

VI.

CONCLUSION.

The decision of the Court of Claims should be affirmed.

Respectfully submitted,

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APPENDIX A.

CHARTER HIRE RATES IN WORLD OPEN MARKETS.

1918	Current Charter Hire Rate per dwt. S. d.	Sterling Exchange Rate	Dollar Charter Hire Rate per dwt.	Ships J. S. Whitney 3090 T.	Ships H. M. Whitney 3230 T.
April (2 days)	41/4	4.76	9.82	2,022.92	2,114.57
May	41/4	4.76	9.82	30,343.80	31,718.60
June	38/9	4.74	9.21	28,458.90	29,748.30
July	36/2	4.72	8.55	26,419.50	27,616.50
August	33/6	4.70	7.88	24,349.20	25,452.40
September	39/3	4.68	9.18	28,366.20	29,651.40
October	45/	4.66	10.48	32,383.20	33,850.40
November	45/	4.64	10.42	32,197.80	33,656.60
December	37/2	4.62	8.61	26,604.90	27,810.30
1919					
January	29/4	4.60	6.76	20,888.40	21,834.80
February	21/6	4.58	4.93	15,233.70	15,923.90
March	22/5	4.56	5.11	15,789.90	16,505.30
April	23/4	4.54	5.29	16,346.10	17,086.70
May	24/3	4.52	5.47	16,902.30	17,668.10
June	25/2	4.50	5.68	17,551.20	18,346.40
July (1/3 mo.)	26/	4.50	5.87	6,046.10	6,320.03
			TOTAL	339,904.12	355,304.30
					355,304.30
					339,904.12
					695,208.42

SUPREME COURT OF THE UNITED STATES.

No. 319.—October Term, 1932.

The United States, Petitioner, *vs.* Acme Operating Corporation; Liberty Trust Company, Intervenor.	On Writ of Certiorari to the Court of Claims.

[February 6, 1933.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on certiorari, granted on petition of the government, — U. S. —, to review a judgment of the Court of Claims in favor of the intervenor, the Liberty Trust Company, respondent here. 74 Ct. Cls. 82. The suit was brought by Acme Operating Corporation, as plaintiff, to recover just compensation alleged to be due to it as the charterer of two steamships, the "James S. Whitney" and the "H. M. Whitney", the use of which was requisitioned in behalf of the government by the Shipping Board, under the Act of June 15, 1917, c. 29, 40 Stat. 182. The Court of Claims dismissed the petition of the plaintiff, but gave judgment for the intervenor, which claimed as the assignee and successor in interest of the Fidelity Trust Company, mortgagee of the two vessels. The sole question presented by the petition is whether the Court was right in giving judgment for the intervenor.

The vessels were each subject to a mortgage of the Fidelity Trust Company, later assigned to the intervenor. The owners chartered them to the Acme Corporation, plaintiff below, and, at about the same time, they were placed in repair yards for alteration and repairs, the cost of which for each ship was paid only in part. On April 27, 1918, shortly before the maturity of the mortgages, the use of the vessels was requisitioned by the Shipping Board. Having been arrested under libels in admiralty by the construction companies for the balance due for the repairs, they were released to the government by court orders.

August 12, 1918, the United States, through the Shipping Board, entered into a contract with the owners of the ships and the mortgagee, predecessor in interest of the intervenor, by which it was provided that the government should retain from the amounts which would otherwise be due as just compensation for the use of the

vessels, its expenditures in behalf of the owners, for transporting to their destinations the cargoes which were in the ships at the time of requisition. If just compensation due "for the requisitioning" of the vessels exceeded the debt to the government, the government was authorized to apply the excess to the payment of the mortgages and liens on the vessels. It was also provided that if the ships should be released from the requisition or returned to the owners before the government should be fully reimbursed for carrying the cargoes forward to destination, the government should have liens upon them for the amount of the unpaid balance, which the owners and the mortgagee agreed should be superior to the mortgage liens.

In December, 1918, requisition charter parties between the government and the owners of the ships were executed as of the date of the requisitions. The charter parties are not set forth in the findings, but they provided that "the owner accepts this requisition charter in full satisfaction of . . . all claims . . . against the United States arising out of the requisition" and accepts the compensation provided by the charter parties "as the just compensation required by law".

The ships were subsequently released by the government and returned by the Board to the owners, the "H. M. Whitney" on July 8, 1919 and the "James S. Whitney" on July 10, 1919. They were placed in dock for repairs and reconditioning, upon completion of which they were removed by the agent of the owners and Fidelity Trust Co., the mortgagee. The court below found that the Fidelity "advanced and paid", for the account of the owners of the two vessels, a total of $129,299.76 "for sundry services and materials in connection with" the repairs, and gave judgment for the intervenor for that amount.

A final accounting was had between the owners and the government which the court below found to be correct. The account, after crediting to the owners $87,706.84, the estimated cost of reconditioning the ships as fixed by a survey, showed a balance of $77,-068.54 still owing to the government for delivering the cargoes which were in the ships at the time of requisition. The total amount due the government at the time the vessels were returned thus exceeded the claim of the intervenor. In September, 1920, the Fidelity Trust Company became financially embarrassed, was taken over by the Massachusetts Commissioner of Banks, and, in April, 1921, its assets were transferred to the intervenor which,

for purposes of the present litigation, may be regarded as standing in its stead.

The court below held that the requisition of the use of the ships when they were in the custody of the admiralty court and when the mortgagee was neither in possession nor entitled to possession, did not entitle the mortgagee to compensation; but it nevertheless held that the intervenor was entitled to recover the $129,297.66, which it expended to repair the vessels after their return by the government, on the ground that "the injury to the vessels themselves was an injury to the res" on which the intervenor held a mortgage. In this we think it was in error.

The intervenor endeavors to support the judgment below on the grounds that the injury or depreciation of the vessels while in use by the government under the requisition charters was, in effect, a destruction of them *pro tanto*, which in itself operated as a requisition of the mortgagee's interest, for which just compensation must be paid (see *United States* v. *Welch*, 217 U. S. 333, 339; *A. W. Duckett & Co.* v. *United States*, 266 U. S. 149, 151) and that in any case, the mortgagee's security was impaired to the full extent of the damage done, and it is entitled to recover the cost to it of rehabilitating its security by reconditioning the vessels.

It is unnecessary to consider in detail numerous objections raised by the government to the soundness of these contentions and to the sufficiency of the findings to support them, if sound. It is enough that the agreement of August 12, 1918, between the United States, the owners of the vessels and the mortgagee, which is binding on the intervenor, contemplated that the government should be reimbursed in full for its transportation charges from "the compensation due for requisitioning" the vessels, before any payments of compensation should be made to the mortgagee. To this end, the agreement provided that in the event that the steamers were returned before the government was fully paid for carrying the cargoes, the government should have "and there are hereby created liens upon said steamers and both of them, for the amount of the unpaid balance . . . which amount shall be forthwith due and payable on the release of said steamers or either of them, and which liens the parties . . . agree shall be superior to the mortgage liens." We think the effect of this agreement was to confer upon the claim of the government priority over that of the mortgagee. The superiority of the government's claim to that of the mortgagee is certainly not affected by the fact that the ves-

sels have been returned and the mortgagee seeks not the full amount of its mortgages, but the amount in which it contends its interest has been destroyed or its security impaired.

When the vessels were returned, $164,775.38 was due the government for unpaid transportation charges. The government has credited upon its claim the cost of repairs found reasonable by the survey, $87,706.84. But even if the full amount of $129,297.66, claimed by the intervenor to represent the damage to the vessels while in the service, be regarded as due to the owners and mortgagee as their interests may appear, the most that the mortgagee can ask is that the government's prior claim be reduced by that amount. Even if that is done, the government's claim is not satisfied, or its lien discharged. Hence, there is no foundation upon any theory for the recovery of a money judgment against the government by the intervenor, as mortgagee.

The intervenor seeks also to sustain its recovery upon the ground that it owns the construction liens for repairs and alterations of the vessels before they were requisitioned. The findings show that the claims of the construction companies were acquired by the Fidelity Trust Company and, in 1921, transferred to the intervenor along with the other assets of that company. But no claim founded upon these construction liens was asserted by the intervenor's petition or considered by the court below. The case was decided, as it was evidently tried, on the basis of intervenor's claim upon its mortgages. The status of the liens at the time of the trial is neither revealed by the findings nor mentioned in the opinion; the findings do not admit of a determination of their validity. The vessels were placed in full repair by the mortgagee; to the extent that they were repaired before the liens were assigned, the lienors could have had no rights against the government for the impairment of their security and they transferred none by the assignments. There is no finding which shows to what extent the repairs had been made at the time of the assignments, although it appears that some of them, at least, were then completed. The intervenor does not say and cannot, on these findings, that it made the repairs to protect the security of the liens rather than that of its own mortgages, which are subordinate to the claims of the government. Accordingly, there is no basis in the findings for contending that the intervenor stands in any better position as the holder of the construction liens than it does as mortgagee.

Reversed.